

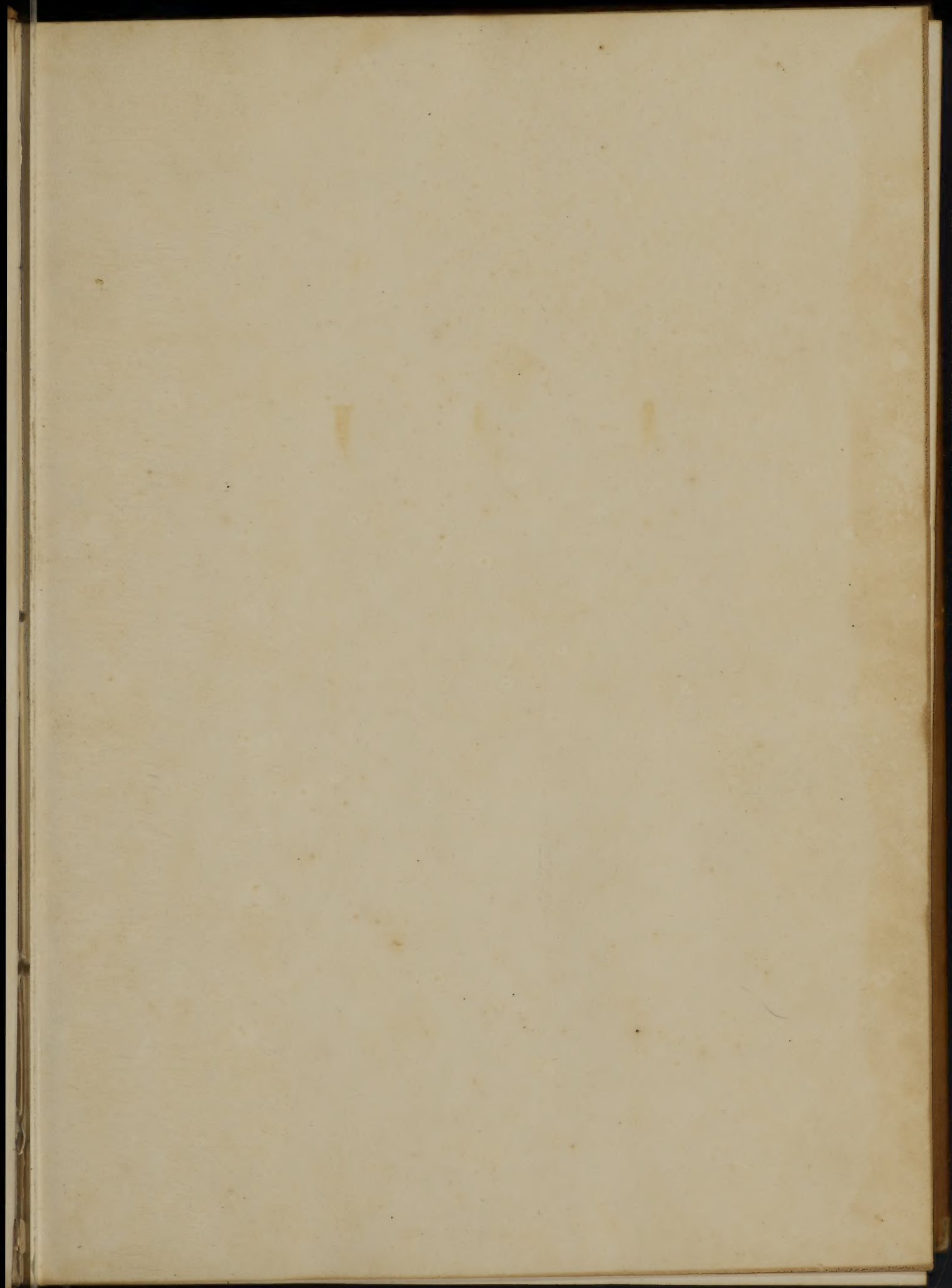
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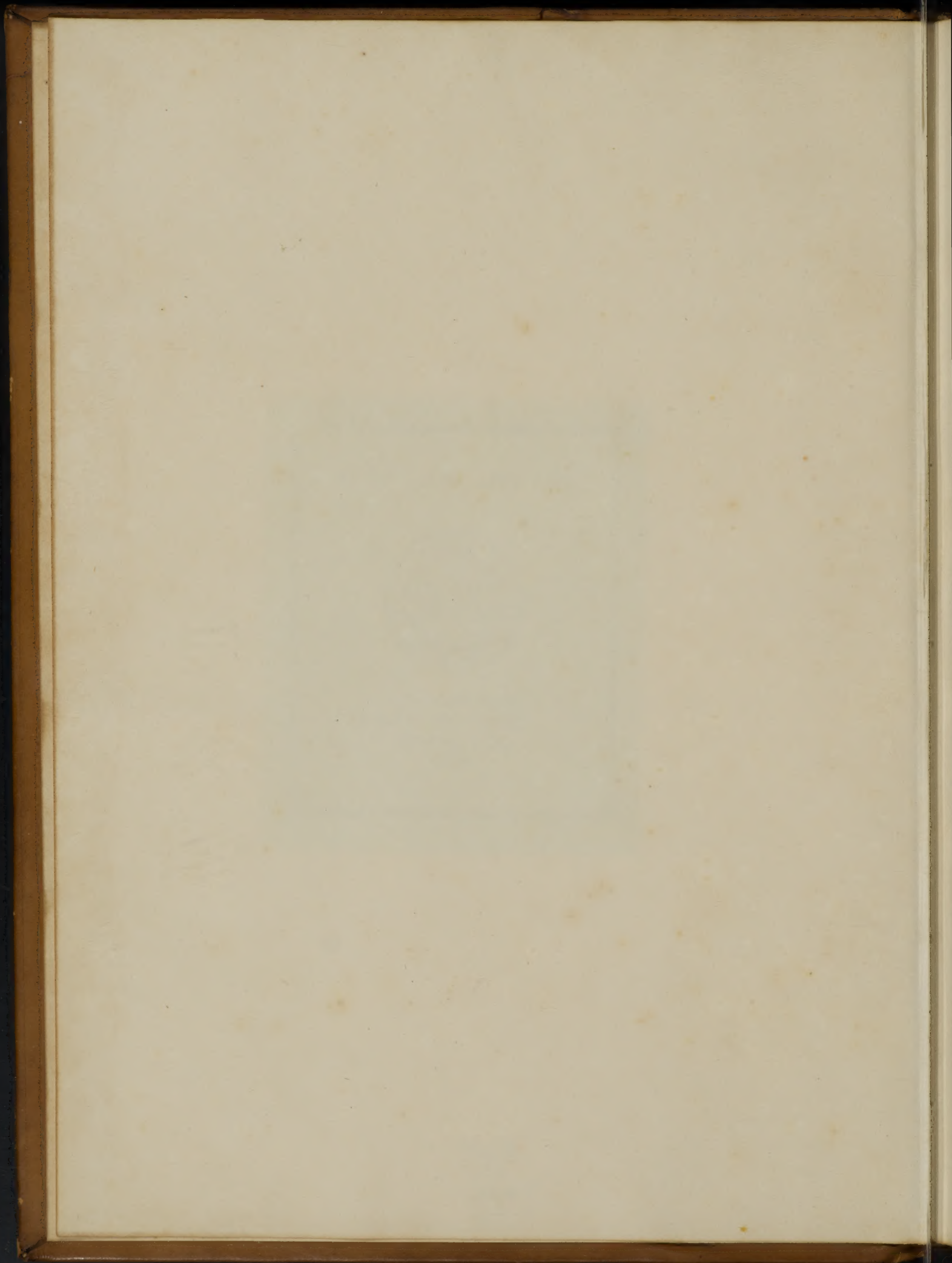
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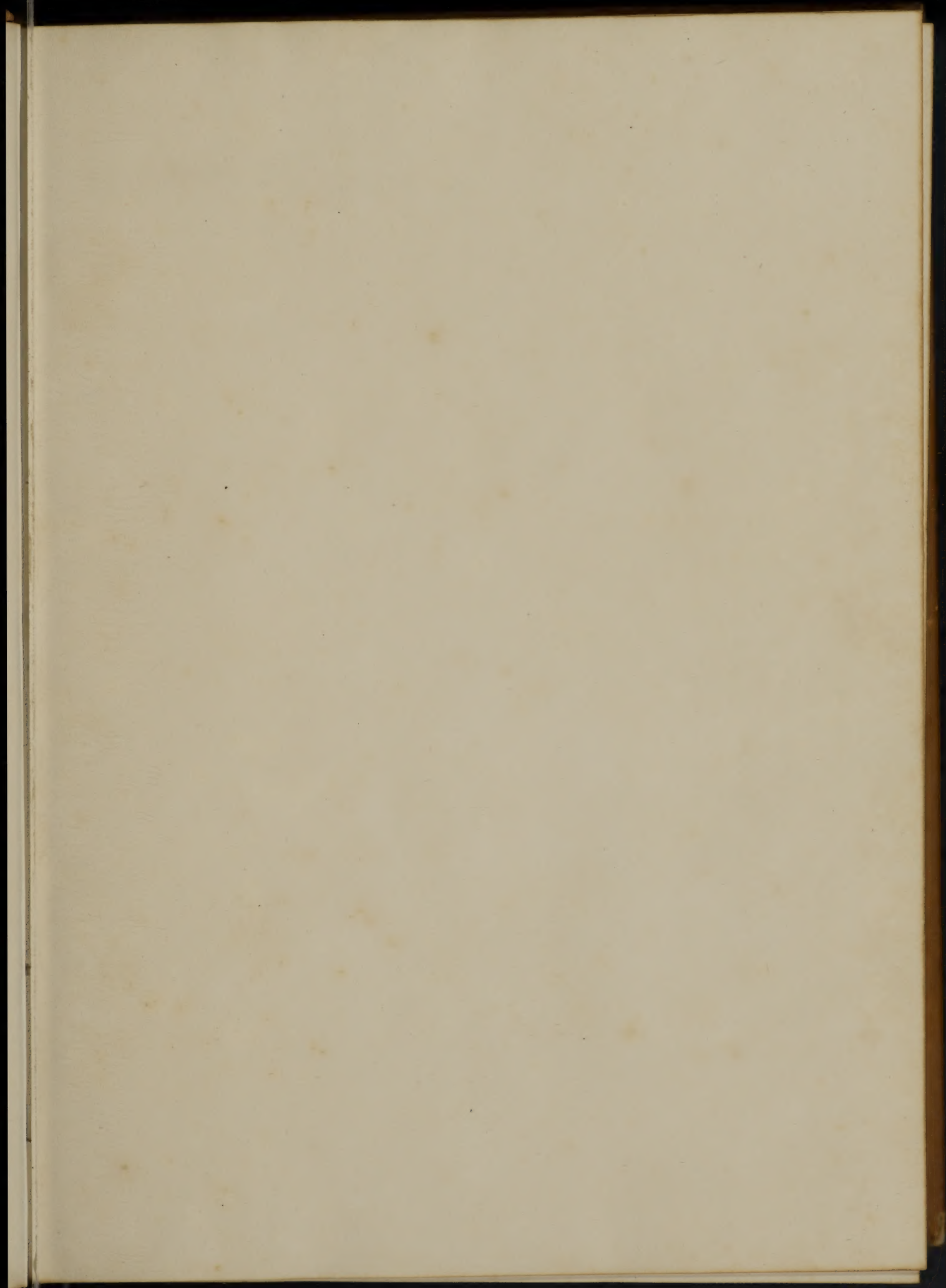


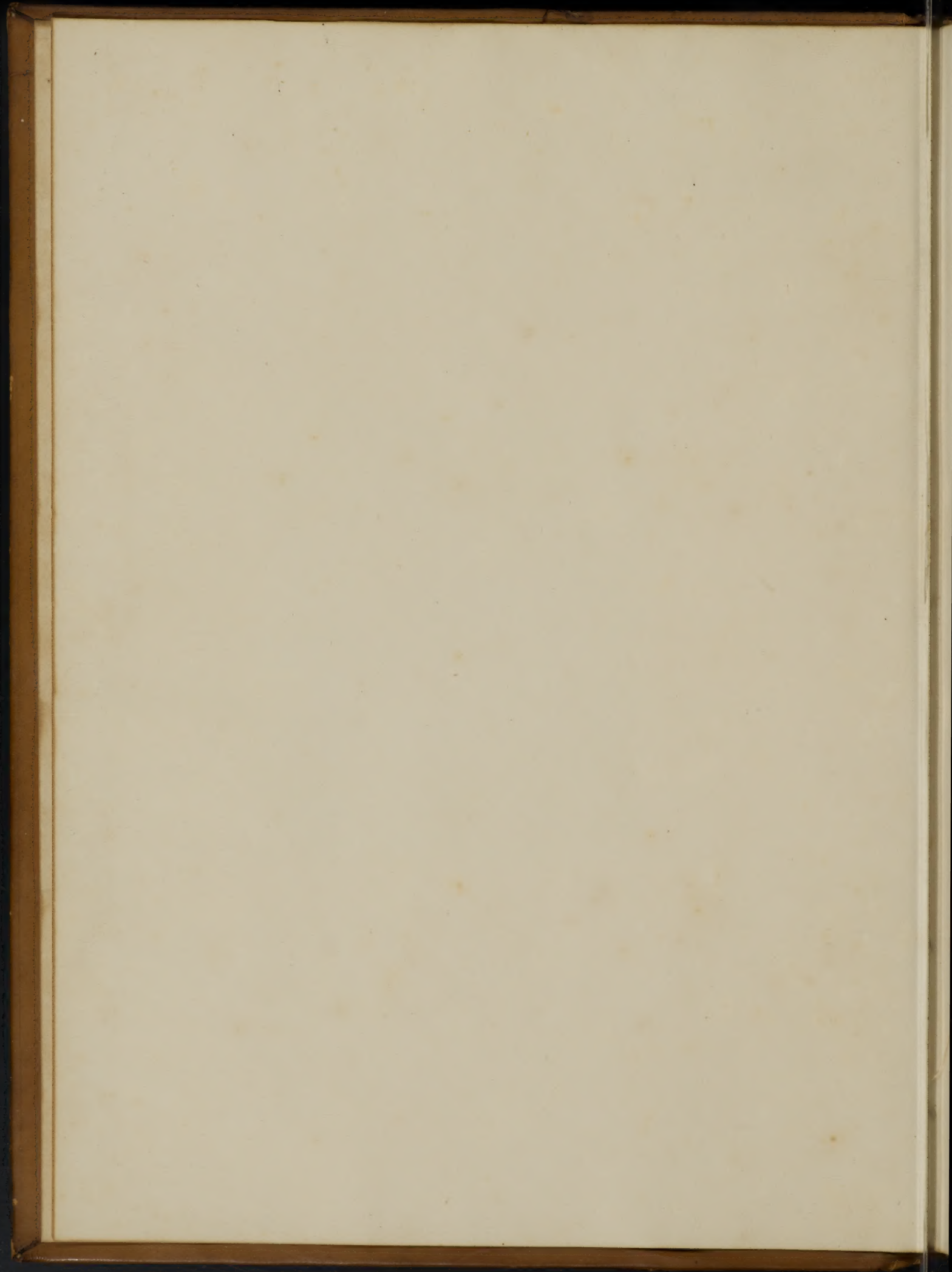
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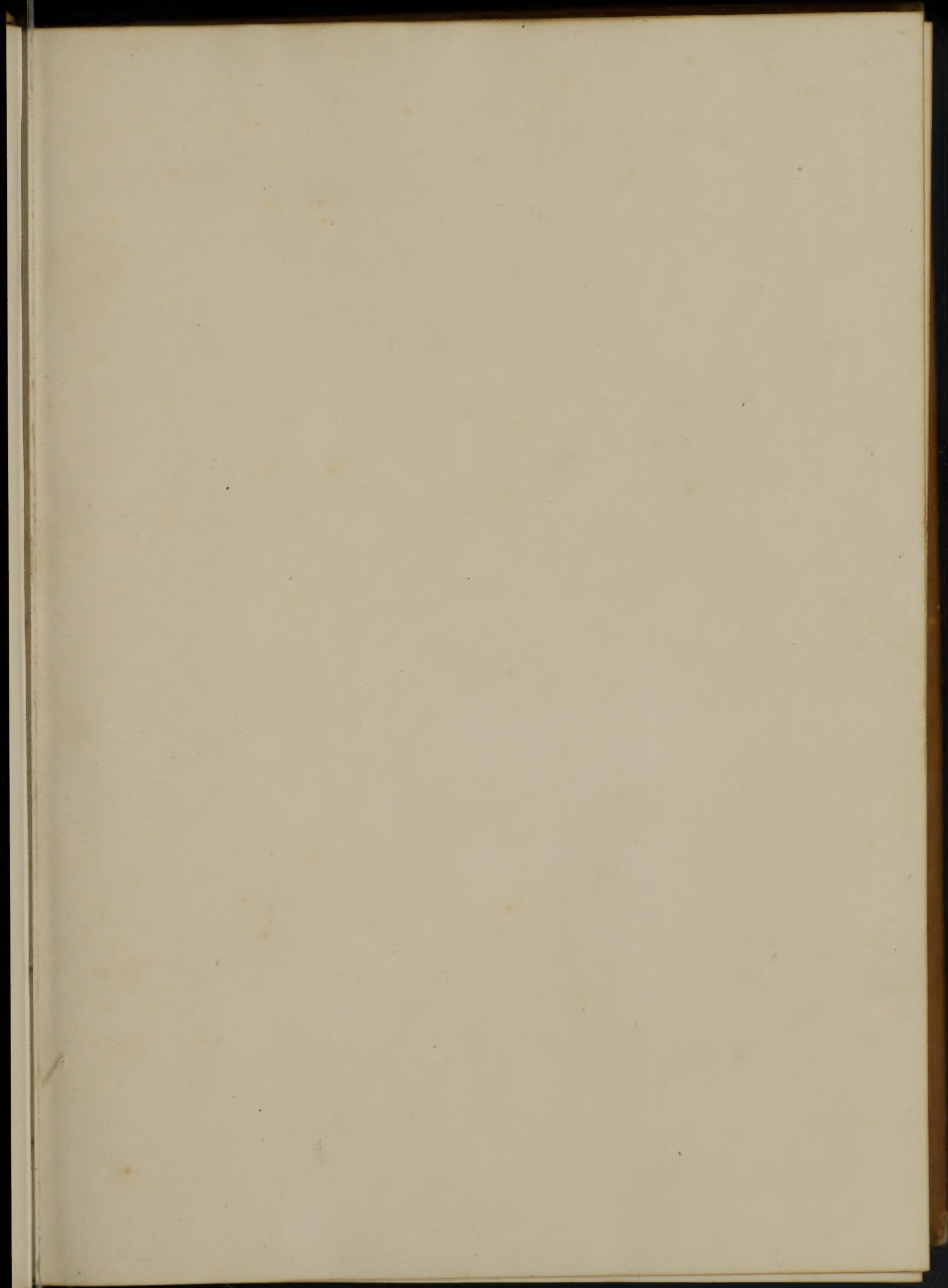
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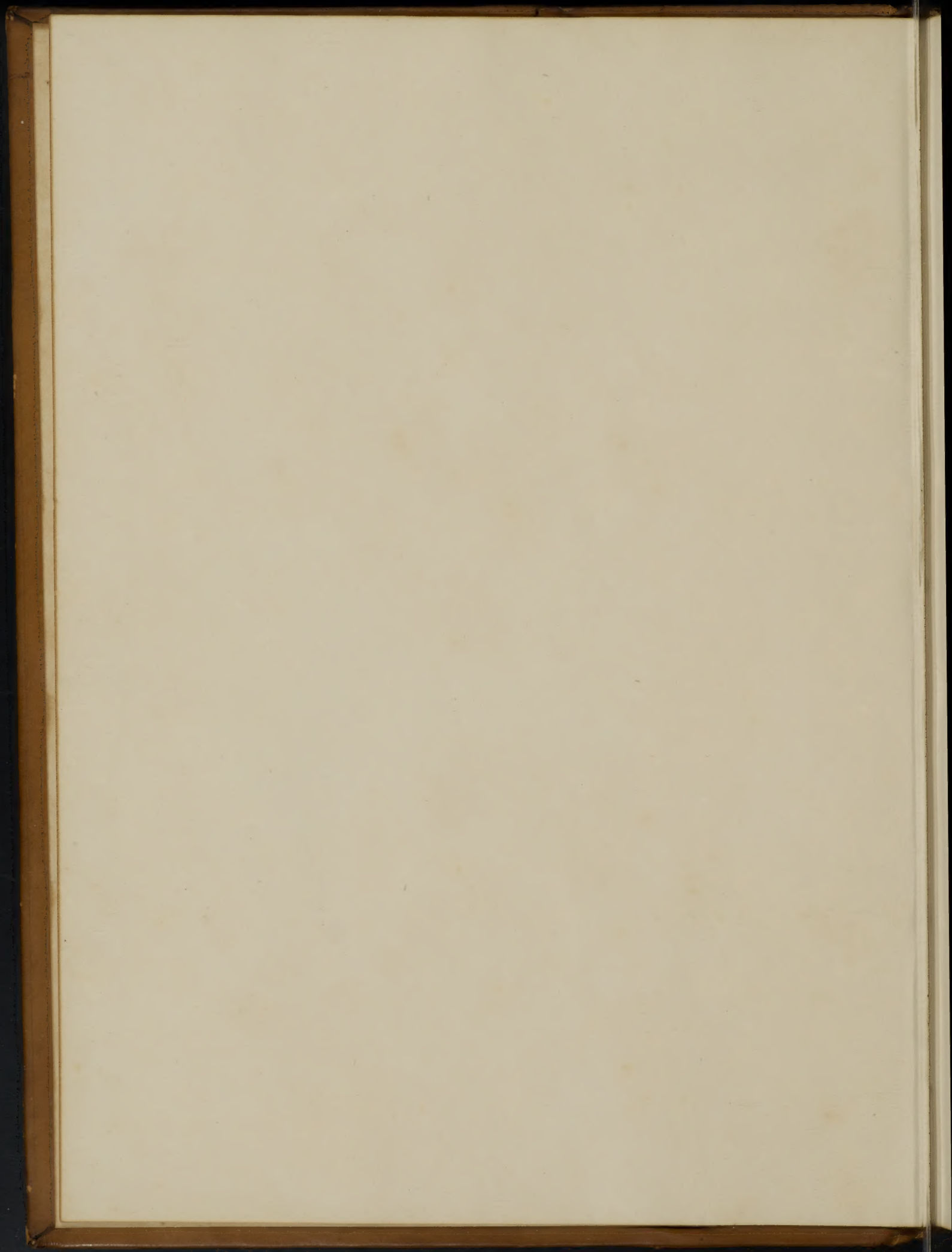


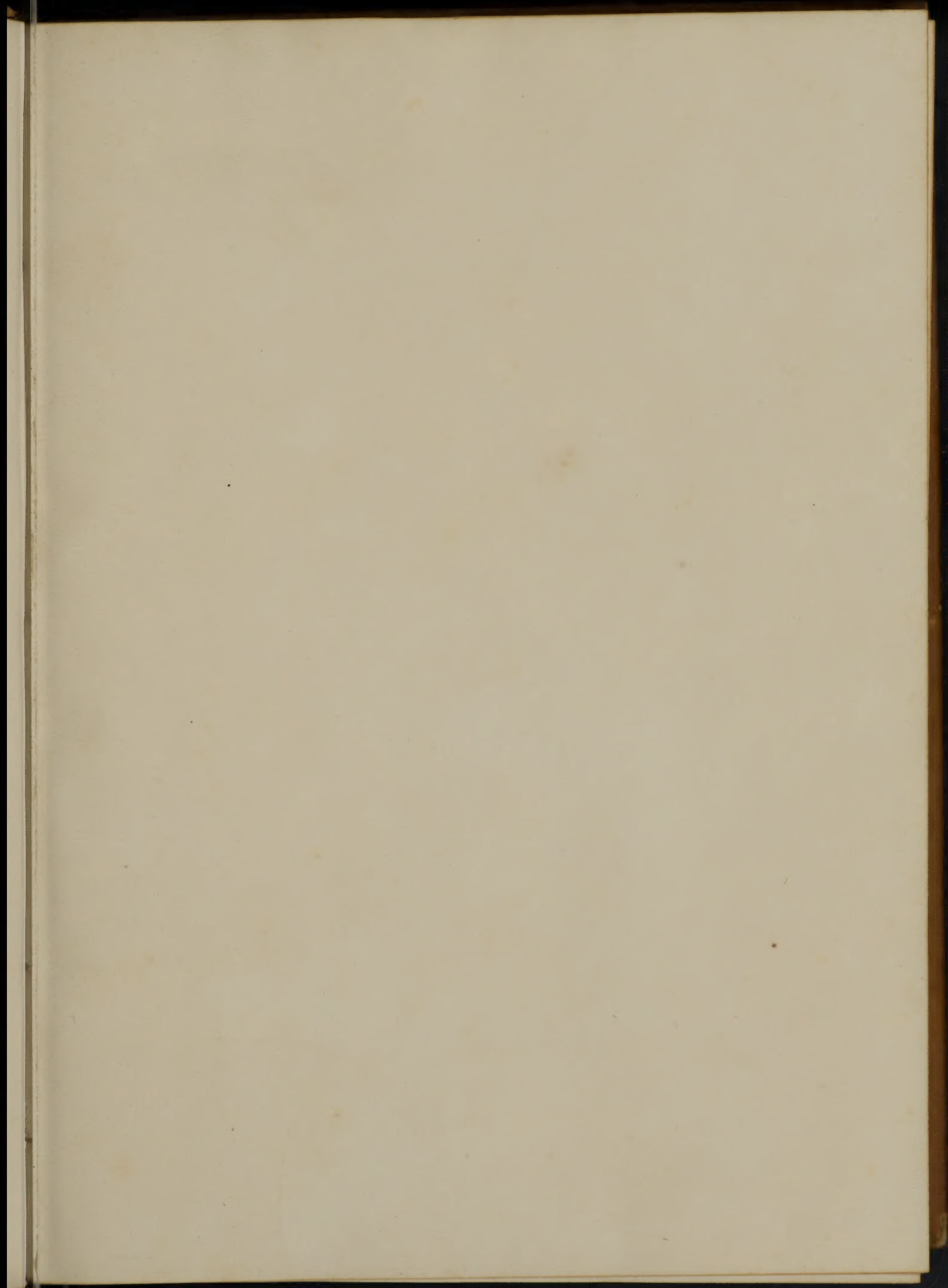


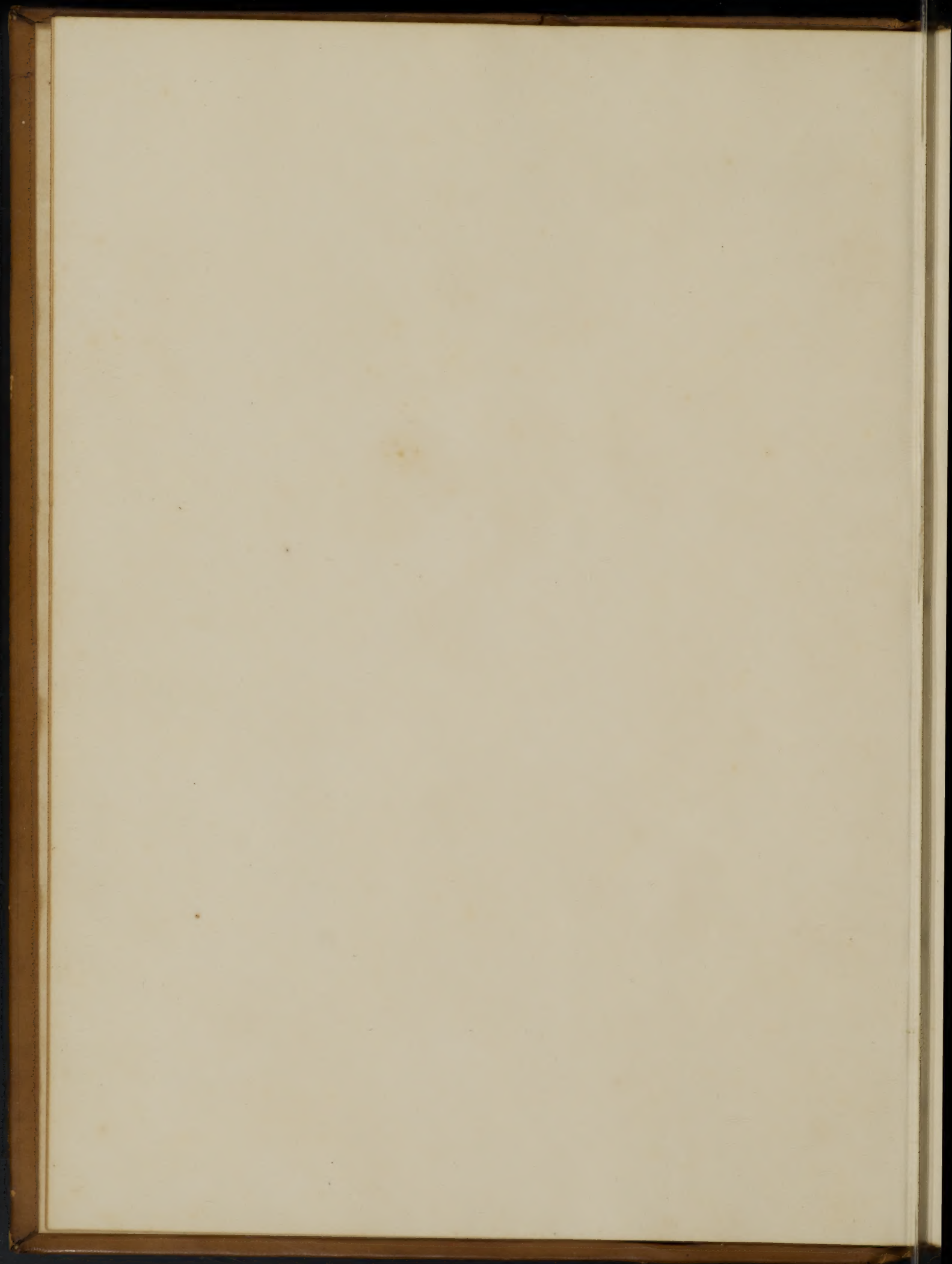


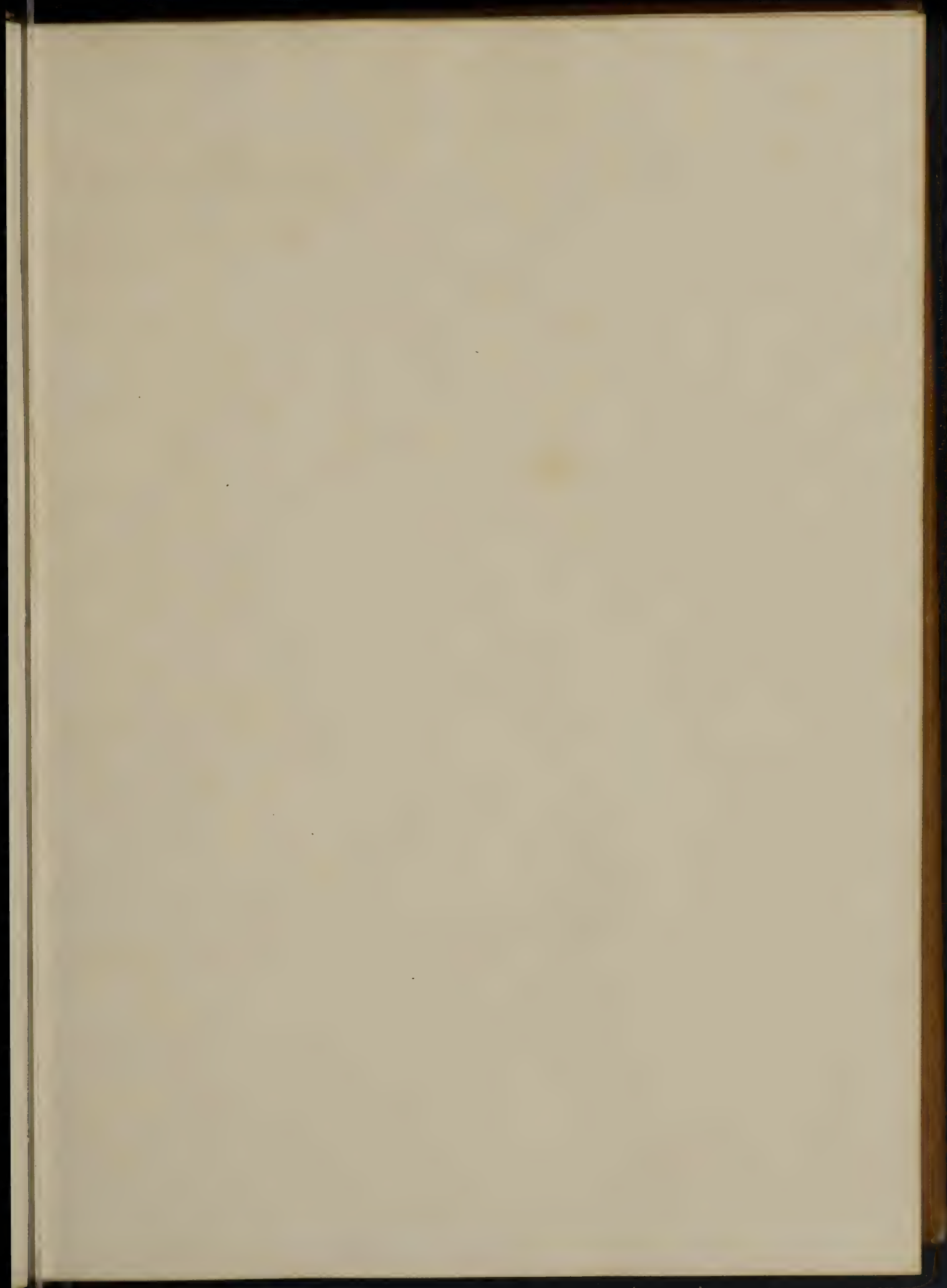


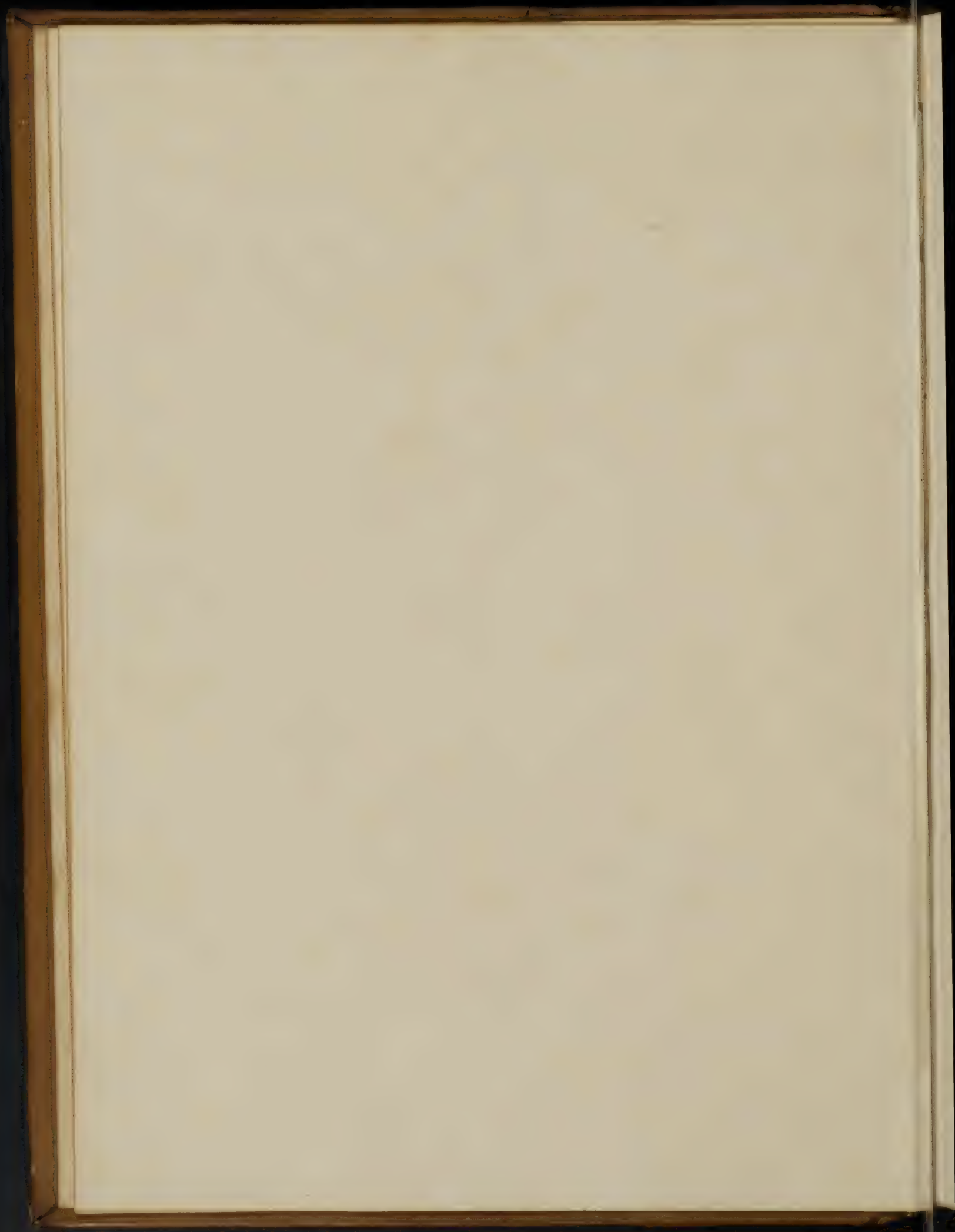


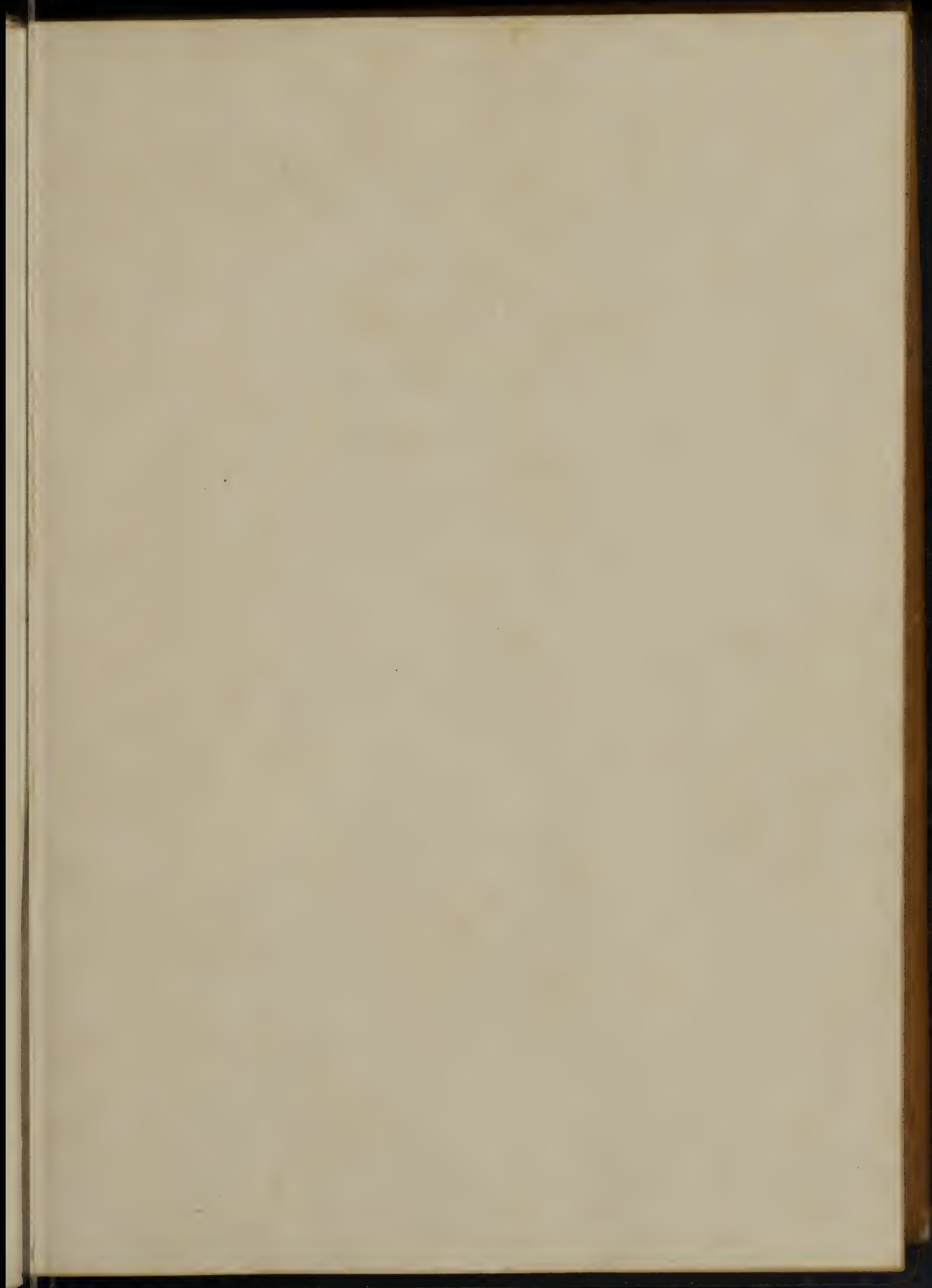


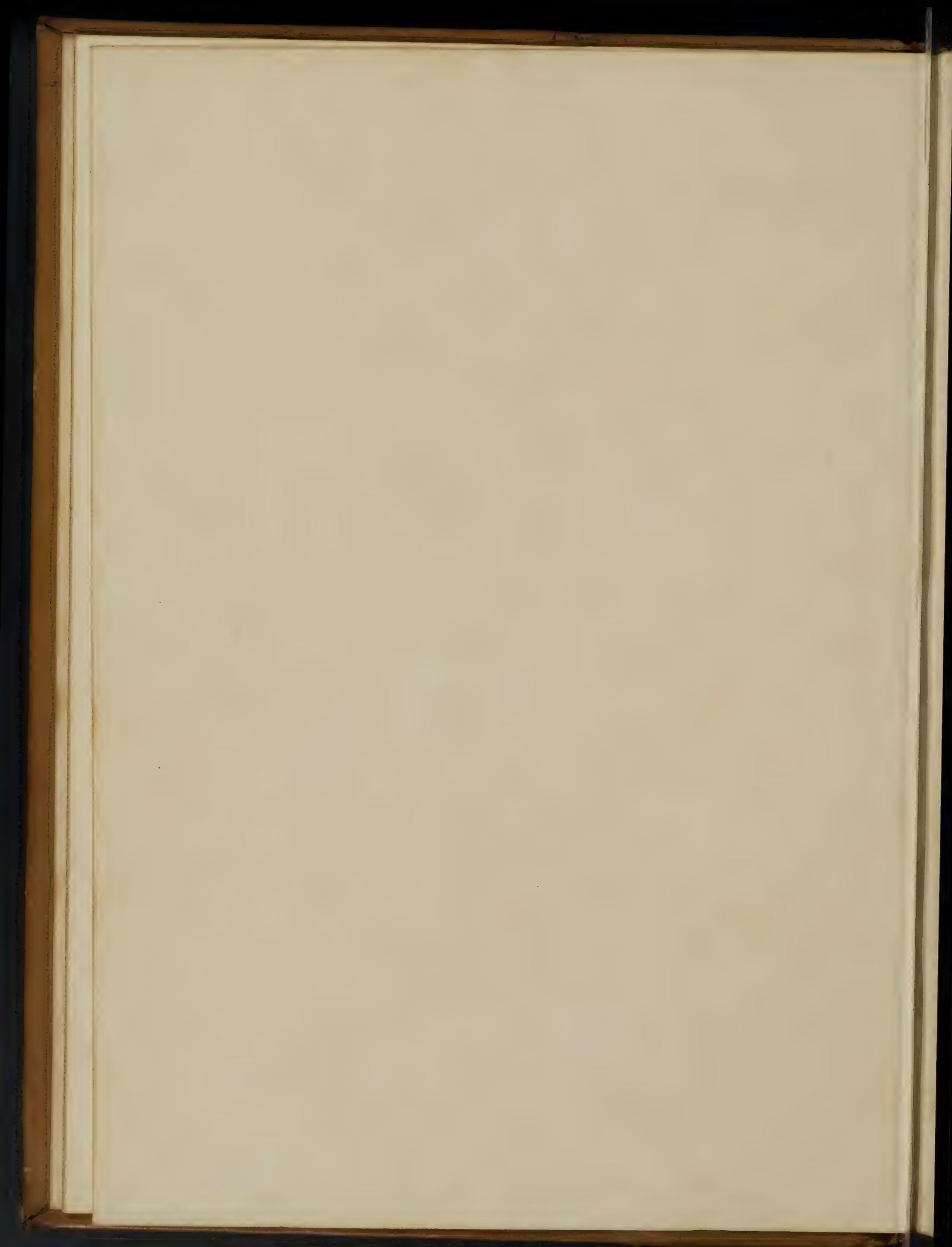








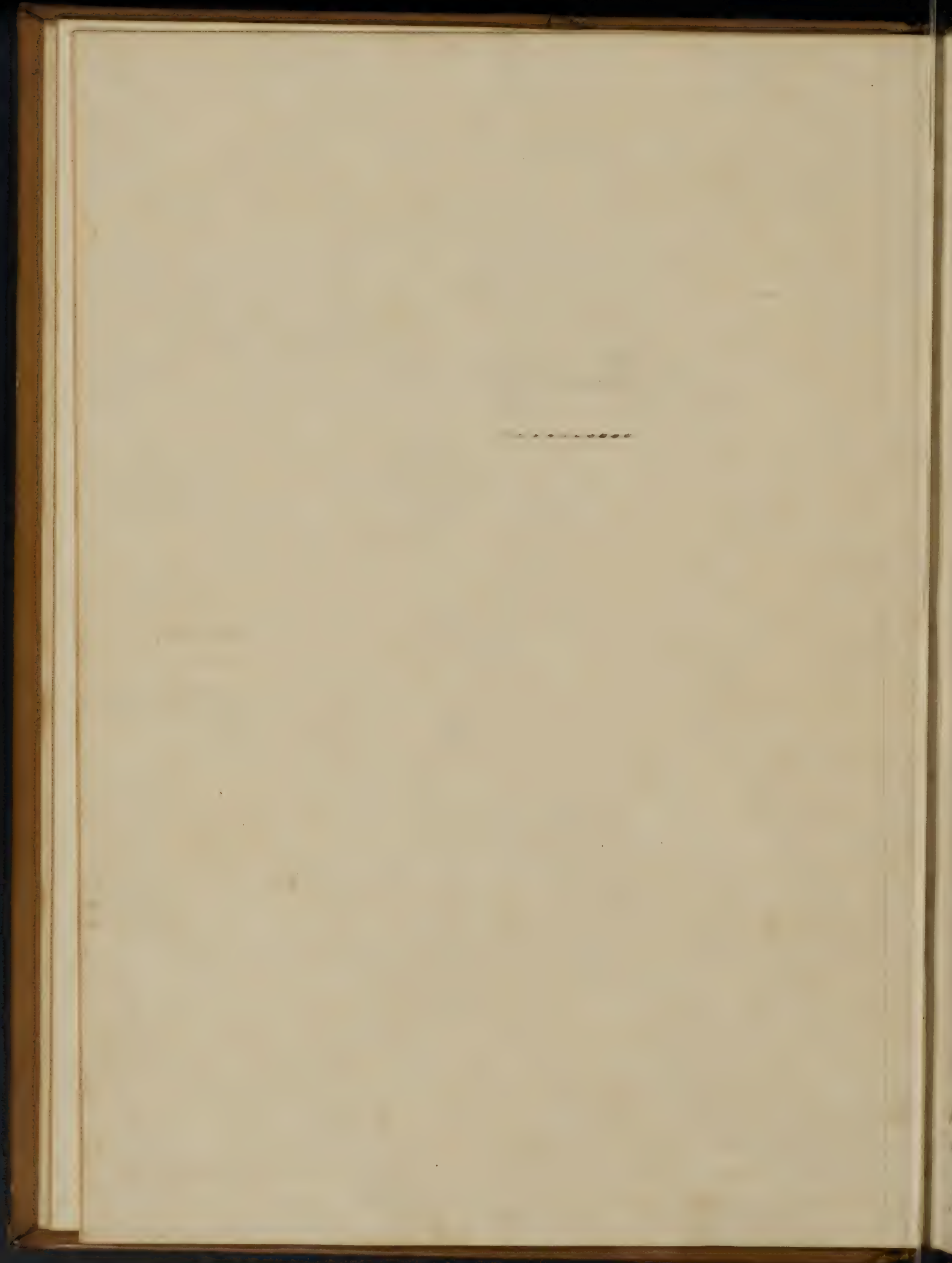




Pleadings.



Primer



Pleadings. March 12th

Pleadings in civil actions are defined to be the mutual altercation between of P'ty & Def't. in a suit, made out in legal form & delivered in writing. 3 Bk. 293. What are Pleadings?

All pleadings were originally oral & delivered "ore tenus" or "viva voce" from one party to the other, Hence they were frequently denominated in Law French the "Parol."

But at this day it is necessary yt. all pleas upon wh. a party relies either in support of his action or in defence shd. be delivered in Writing.

1 Co. 132. Bac. ab. 1.

The pleadings & judgments in books of reports present 3 diff't. languages & these correspond to 3 diff't. periods of Eng. History viz. Norman-French, Latin, & English.

The French, as y name imports was introduced at y Norman conquest & continued to be y legal language till 18 Edw. 1st Laws. 23.9. 3 Bk. 317. 24.

The Latin was then introduced & made y instrument of conveyance & diffusing y law till it was subverted by y Eng. tongue during Cromwells administration. After y restoration y Latin was revived, but was entirely superseded by stat. 4 Geo. 2. Laws 23.9. & Bac. 1.

But what are these alterations? They are the setting forth on y one hand y facts sh. constitute in law the P'ty's demand, & on y other hand, y facts. defence. 3 I.R. 189. Long. 278. 4 Bac. 1

Ed. 9 Mansfield observes that Pleadings are founded on sound sense & y strongest logic.

Pleading is strictly a more logical process. & y rules of Pleading, according to Sir Mr Jones constitute a beautiful system of legal logic.

Every good declaration is substantially, if not in form, a good syllogism. - Take for example the

plea in a case for "quare clauum fregit" "apst. him who forcibly enters upon my land, I have by law a right to recover damages. The Dft. has forcibly entered upon my land, therefore I have a right to recover damages of y Dft." Brev. 319. 3 Bk. 369. Law. 2.

The first or major proposition is not generally expressed. Formerly it was, But it is not necessary, for y Judge being supposed to know the law, y expression of it is of course superfluous. 2d. Ray. 21. 88. 175. Ch. R. 184. 234.

Particular customs & private stats. must however be specially pleaded like any private document. 2 Ch. R. 241. 4.

The first or major proposition then contains y legal principles on wh. y P^{ty} relies.

The minor proposition states y facts to sh. y principles apply in y particular case. The conclusion is an inference of law from y application of y principles to those facts. 3 Bk. 380.

2. On the Dft's. side, y major proposition or legal principle is or is denied by an issue at law, which denial is called a denial; for since y proposition is matter of law, y denial also must be matter of law.

The minor proposition must be denied by matter of fact, (i.e.) by genl. or special issue.

The conclusion can be denied in neither of these ways, for if y first proposition be true in point of law, & 2^d in point of fact y conclusion is inevitable.

Suppose then both true, y Dft. must rest upon something collateral.

A special plea denies y law & y facts, but alleges some new matter, & a negative conclusion.

The plea of release is as follows, If y P^{ty} upon whose land I have forcibly entered, releases to me his

right of action, he is debarred from his right to recover damages. For he has released to me his right of action, and, ergo, is debarred from his right to recover vs. me.

Tho. this may be true, yet another plea of some nature may be given by y. Pth. & so on. The pth. may demur to y. principle or allege, et, y. release was obtained by fraud.

The object of this process, & of course of all pleadings, is to obtain y. ends of justice by simplifying y. grounds of controversy so as to make y. suit depend as much as possible on a single point.

This is a short description of y. genl. nature of Pleading.

The first stage of y. suit commenced is y. writ. This however is no part of y. pleadings. It is a command-
The First Stage of the Writ.
ary letter directed to y. Sh. to compel y. Dft. to appear & answer to y. charge alleged. 3 Bk. 273. Co. 484. 1 Wils. 147. 7 T. R. 4. Cro. J. 11. 2 Burr. 960. Carth. 223.

I will remark, however, "en passant" that when a suit is commenced by bill as in C. D. y. filing y. bill is considered y. commencement. This is, in fact, a declaration founded on a fictitious writ, called a "latital". 1 Bac. 41. 6 Co. 48. Burr. 1323. In the Eng. practice y. date of y. writ, may be fictitious but y. cause of action must exist at y. time of y. writ's issuing.

The true time of y. writ's issuing may be proved to let in y. plea of tender on y. stat. of limitation.

Straw. 638. 1 Wils. 141. 3 Bk. 273. Lawes 78. Pak. 25. 289. By y. Eng. practice & et. of most of the states, y. writ issues 1st & y. declaration upon y. return of y. writ. In some both issue together. Bac. abr. "Tender".

The first stage in y. pleadings is y. count or declaration. It is y. writ is y. commencement of y. suit, so y. declaration is y. commencement of y. pleadings.
First Stage in Pleading is Declaration

The Latin "Placitum" signifies any kind of pleadings. The term is "nomen collectivum". 1 Lound. 338. a. b. n. 6. 1 Bac. 41. & includes all y. pleadings of y. parties. Wood. 84. Carth. 134. Talk. 219.

Division
of
Pleadings.
3.

Declaration.

The count or declaration is an amplification of
the writ, adding circumstances of time & place.

The writ expresses a genl. complaint, & a declara-
tion expresses a complaint with particulars.

Laws 1.2. 1. Plk. 293. 301. 4 Bac. 8. 11. 219. Earth 374

The next stage is a Defs. plea in answer to the
declaration - if he shd. not so answer, judgment. vs. 80 appt.
him. 4 Bac. 100. 1 Plk. 299. 300.

Pleas on y part of y Defs. are of two kinds.

I. Dilatory Pleas. II. Pleas to the action.

Dilatory
Pleas.

Pleas to y action, Pleas in bar, & peremptory pleas, are
convertible terms, & are synonymous.

Dilatory Pleas are such as tend to delay the
suit, by questioning y mode in wh. it is brought, rather than
denying y Plffs. ultimate right to recover, & will operate
as a successful defeat of suit. 3 Plk. 301.

Dilatory Pleas are divided by some into 4 or 6 kinds, but
they may be comprehended in 3 following. 1. Id. 572. Bac. 8. 11.

I. Pleas to y jurisdiction of y court.

II. Pleas to y disability of a Plff.

III. Pleas in abatement so called. 3 Plk. 301. 302.

All dilatory pleas are frequently called pleas in abatement
but erroneously, for there is a material diff. Laws 1.2. 37.

Pleas to the
Action.

Second, Pleas to y action, These answer y mer-
its of y suit, always denying y Plffs. right to recover

4. the cause of y action. The cause of action may be de-
nied by y Defs. in either of y three following methods.

I. By denying y allegations of y Plffs.

II. By confessing & avowing them to wh. may be added

III. By pleading matter of estoppel, for y

last plea does not strictly deny or confess y Plffs. alle-
gations. 3 Plk. 303. 304. Laws 1.2. 130. 140. 4 Bac. 54.

I. Pleas to y action wh. deny y complaint.

are of 2 kinds. 1. General plea.

2. Special plea in bar.

These are both now pleas in bar, y one genl. y other special.

They are y only methods of denial by pleas to y action.

The cause however may be denied by a denial. The denial is not a plea, but is a denial of y P'ty's Denial right to proceed agst. him. He denies, yet, he is bound to plead, & prays judgment. Whether he is bound to plead or not. 4 Benc. 54. Mr. Lawes says it is an irregular mode of ~~proceeding~~ pleading. (A denial denies & may or may not be an excuse for not pleading.) A denial is confined to any particular parts or species of pleading, & y mode of denying is not strictly a plea.

The office of a denial is to deny y legal sufft of y allegations of y opposite party, & avoid them. Indeed y practical language of a denial is "even admitting wh. you say, it avails you nothing." (Co. Lit. 72. a. 5. Mod. 132. 4 Benc. 129. 130. 2 Hag. Denial) & not sufft. in law.

The following rules apply to pleadings in genl. Gen. Rules.
First. In all pleadings 2 things are indispensably requisite - first, that y subject matter of y allegation be sufft. 5. in law. & secondly - that this matter be expressed according to y strict forms of law. And y omission of either of these requisites is a fault & vitiates a course of denial. Hob. 164. Cowp. 683. 3 Benc. 2 Hag. Lawes on 2 Hag. 45.

If y fact be insufficient y fault is in substance, & may be reached by a genl. denial, if in form y fault is in law, & can be reached only by a special denial.

As a genl. rule it is necessary to allege matters of fact, & conclusions drawn from those facts. It is not necessary to allege y law upon them. for juries are presumed to know law.

It is necessary to allege facts in all pleadings & facts may be declared upon wh. exist only in fiction. The more evid. of a fact is not sufft. The evid. of a fact does not express its existence. 5 T. R. 10. 1 Lev. 164. 11 Mod. 193. Lawes 469. 2d. Rayd. 1517. Cro. J. 583. Cro. E. 913.

Doug. 159. 2 Root. 74.

Second. Where from facts alleged y law presumes a promise, that promise must be expressed. Thus in an action of trover, it is not sufft. to allege a demand & refusal, y plea must express a promise to

grant or demand. 2 La. Ray. 1317. 1 Ch. Pl. 196²⁷⁵ Salk. 663.
Cro. E. 916. 2 N. R. 63. n. La. Ray. 530. 1 Ma. 5. 181. 1 Ma. 793.

In y last rule there is one single exception. In a bill of Exchange & promissory note, it is not necessary to state, after all y facts are stated, a promise on y part of y acceptor. This is y case, tho' y universal practice is to conclude with a promise. Salk. 128.

Stro. 224. 2 N. R. 63. n. Ryd. 13. 196. 2 La. R. 538. 4 Ma. 5. 581.

Drawing a bill, La. Holt says, is in part a promise. He ridged y proposition itself altogether arbitrary.

Stro. 224. 2 N. R. 63. This extends to actions mly agst. y drawn maker.

6. Third. It is necessary, that all pleadings be direct, & not argumentative or stating by way of inference. For all y facts on wh. y parties rely, must be stated in direct terms, secus no issue can ensue; there being no direct aff. or neg. sh. constitute an issue.

It shd. be direct 1st for y sake of certainty. 2^d that the opposite party may take issue upon them. 8 T. R. 278. Lawes 175. 731. Plead. 128. 1 Co. Lit. 303. Bac. 4 Lawes 69. 75. Yelv. 233. 1 Saund. 117. n. Cro. J. 183. 1 N. R. 458.

This rule requires qualification. See 2 Ma. 518.

4 Bac. 22.

An avowment in this form shd. be added "or this that" "*pro eo ex quo*" "*quia sicut*" 1 Saund. 47. n. 184. Plead. 155. Yelv. 21. "Altho' because" is sufficiently direct to introduce a material fact. So also y words "*scilicet*" "*videlicet*" &c. 1 Leo. 194. 2 Vent. 276. 8. Cro. Pl. 389. Lawes 47. 64. 1 Saund. 117. n. 184. Plead. 128. 5. Yelv. 121.

Fourth. - Each party admits, of course, so much of his adversary's allegations as he does not deny, - or, in other words, so much of his inavertible allegations as he does not deny. The parties are making reciprocal allegations vs each other, & each has a right to deny. If then he omits this right, he tacitly admits y allegations. Salk. 91. 1 Inst. 303. Hob. 234. 1 Mills. 338. 1 Bac. 273.

Fifth. - Each party's plea is to be construed most strongly agst. himself. If it has an ambiguity or double meaning, it is his fault. Each party is presumed to make the most of his own cause. Hob. 234. Co. Lit. 902. Litch. 186. 2 H. Bl. 330. 4 Bac. 2.

Sixth. - In pleading a transitive fact it is necessary to plead it with time & place. Laws 57.8.

The reason for y time is founded in y rule requiring certainty. 2 East 497. 11 H. 226. 4 T. R. 651. 1 Mc. Mill. 306. 2. 3. 2 H. & L. 18. Com. Dig. Pl. 6. 59.

The reason of y place is, that they may know whence to call y jury. Gill. Hist. com. 20. 21.

In transitory actions it is not necessary to allege y time & place. It is not necessary to allege y place in an action not transitory. There is no diff. between alleging y place, by way of loca description & alleging it, by way of venue. 3 B. & A. 10. 2. 1. 2. 1.

If A. alleges yt. B. committed an assault in y town of C. & County of D. it is not necessary to prove it y place being alleged in this case by way of venue merely. But if A. alleges yt. B. committed an assault in the house of J. D. in y town of E. it is a local description & must be proved as laid (ib. aucts.) East 457. 170. 220. 42. 4. 561.

Seventh. The number, quantity, & price of things pleaded need not be stated truly, except where a mistake wd. occasion a variance. A variance is an incongruity between wh. is alleged, & a written cont.

Thus he may declare yt. y Lft. recd 500 lbs. of flour, & if upon trial he sho. prove but 5 still y declaration wd. be good; for twd. occasion no variance. But if he declare on a written agreement, & states it diff. from y true meaning & extent, he does it at his peril. If A. sues B. on his special promise to pay him \$100 & proves a promise to pay \$99. y evid. wd. be inadmissible on this occasion a variance. Laws. 49. 51. 2 East. 292.

It is a maxim in y law yt. mere superfluous or unnecessary matter does not vitiate y plea, "utile per inutile non vitiatur" but yt. repugnancy or self-contradiction does. is in intention & circumstances. Leach 113.

There is a distinction here, Repugnancy, in a material point is a fault in substance, & is an incurable fault, while repugnancy in an immaterial point is a fault in form & advantage can be taken of it only on special demurrer. Lewys 63. 170. 2 East 233. Co. Lit. 303. b. 4 Co. 42. Cro. J. 337. 49. 618. Co. lit. 288. g. 4 Pacc. 294.

Eighth. Every thing shd. be pleaded according to its legal effect, tho. it shd. vary from y form & structure of y thing.

Thus if one joint-tenant shd. convey his right to his co-tenant by deed or giftment, this giftment shd. not be pleaded as such but as a release. 1 R. R. 440. Corp. 399. Com. Dig. 37. 1 Laurie. 96. 1 H. B. 313. 2 ib. 11. Corp. 832. 2 H. B. 494. 4 Pacc. 100. Co. Lit. 193. Doug. 692. Lo. Ray. 400. Chit. 253. 2 R. R. 487.

Again a bill of exch. payable to a fictitious payee shd. be declared upon as payable to y bearer for yt. is its legal effect. 3 T. R. 182.

Tho. it is so. yt. every thing shd. be pleaded according to its legal effect or signification, yet this rule is not strictly imperative, for it has always appeared to me yt. a count may be pleaded as it is, & y Court will decide in wh. manner it shall operate - But it is y most proper like way to plead to it accordg. to its legal effect.

2 H. B. 11. Doug. 642. 1 H. B. 313. 3 T. R. 182. 481. Chit. on 15. 1837. 48. 234.

Ninth. That what appears sufficiently obvious from y record itself need not be formally averred. 9 R. if A. sues B. in trover, for taking & converting to his own use 100 Spanish milled dols. it is not necessary to allege y value for it appears

given & record. 7 Co. 40. 9 ib. 54. a. b. 11 ib. 25 a. 2 N.R. 77.
Co. Lit. 303. 4 Bac. 2.

Tenth. Where necessity circumstances are
implied in facts yt. are alleged, it is unnecessary
to allege them. Co. Lit. 303. b. 1 Saunders. 228. 2 ib. 305.
a. n. 13. Talk. 91. Lawes. 48. 2 Ch. Pl. 214. (8. 9.)

Pleading a feoffment with the livery of seisin is
pleading ^{substantive} ~~substantive~~, & it is somewhat singular yt.
J. Buller shd. state yt. as an example in why verdict
ind. cure y fault, when in fact there is no fault in y
proceeding. This observation has been frequently
made & I am surprised to hear it from J. Buller
who was y most perfect & special pleader of his
day. (9 ib. 25. a. a note. 55. Lawes 138. these belong below *)

That wh. appears upon y record need not be
formally averred. Cro. J. 362. 7 Co. 40.

Eleventh. Pleading matter of fact and mat-
ter of law, so yt. they can't be separated in an issue
taken on yt. Plea, is bad. (e.g.) Suppose a Pth.
asserts yt he is entitled legally to all y effects
possessed by persons in a certain county, this
blends fact & law, for y fact is dependant upon
ascertaining what y law is. Talk. 91. 7 Co. 25. a.
2 ib. 55. 4 Bac. 68. Lawes 138. *

Twelfth. If that is admitted by both parties
in pleading can't be aft. contradicted by a verdict.
for a jury have no power to find a verdict contrary
to y admission of both parties. Bull. 289. 2 Roll. 5.
Lawes 48. 4 Bac. 2.

Thirteenth. Genl. estates in fee simple may
be alleged generally (i.e.) y party may aver sim-
ply yt. he was seized in fee simple with the oc-
casioning how or in what manner. But when y particu-
lar estate is pleaded, the commencement &c. must be pleaded.

The reason of this is not obvious, The reason, however, appears to be this, y^t genl. estate may commence with a tort. (e.g.) trespass) - & this tort is a matter for y^e jury to find. (Co. L. 303. b. Co. bar. 938. 1 Ta. R. 331. 5.) But a particular estate could not so commence. It is always supposed to be acquired by some legal title. The method of acquiring is ergo known & must be stated with y^e time & manner of obtaining possession. (2 Wils. 42. Salk. 302.)

In y^e declaration, a genl. mention of a particular estate may be affirmed. But where y^e particular estate is denied & pleaded in any pleading after y^e declaration, y^e time & mode must be specially stated. 1 Ld. Ray. 331. 34. 3 Hils. 72. Salk. 302. Co. Lit. 303. b. Co. L. 938.

Fourteenth. It is a rule, y^t immaterial averments, when contradistinguishable from impertinent ones, must be proved as they are alleged. Impertinent averments, never require proof. The rule is "when a variance results from not proving it, it is necessary to prove it".

It is so, in a note to Doug. 41. y^e rule of proving immaterial averments extends only to records & written contracts. Doug. 640. 1069.

This note as I conceive is erroneously expressed. It sh^d. be express contracts.

The following is a case in point, y^t landlord had an action agst. a sh^{ff}. for taking all y^e goods from y^e premises so as to leave none for y^e rent of y^e tenant. He deduced his title as asserting y^t y^e tenant was to pay on a lease so much semiannually. This latter clause was an immaterial averment & unnecessary to be stated. It was never true. But it being necessary to

prove it as stated, he lost his suit by failing to prove it.

Immaterial does not mean impertinent but unnecessary. An impertinent averment need never be proved for it is wholly foreign to the cause.

1 T.R. 235. 2 Ch. Pl. 231.

2 East. 446. 92. Doug. 669. 2 Burr. 1104.

3 East 33. 521. 497. 2 T.R. 643. 2 Mc.Kelz. 501. 13.

3 Bull. 5. 1 Ch. Pl. 306. 2 Lams. 207. a. n. 24. 820. 6. 2. 2.

Ess. Dig. 521. Lams. 550. Bl. & 1104.

The contract shal. not be falsely stated, & if it is, it creates a variance whether the contract be written or parol, as (I think) a parol contract may be a special contract as well as a written one. Bristle v. Wright. Doug. 669. an important case, by refusing to sh. you may see an instance of the distinction between an impertinent & immaterial averment.

Fifteenth. If the Declaration or other pleading want form only, as if they want the necessary circumstances of time & place, & the adverse party does not make a special demurrer, but pleads over, he cures the defect. In like manner if he pleads double, & he pleads over, the fault is cured. But if either party makes an error in substance it is incurable. It can't be cured by pleading over.

By substance is meant such matters of fact as constitute the ground of the action. It is the foundation of the averment, & sequence, & matter of form is merely the method of stating the defence.

4 Bac. 2. 8 Co. 120. 7 do. 25. a. Co. Lit. 303.

2 Salt. 518. 2 Vent. 222. 1 Lew. 195. 3 do. 91. 1 Kent. 50.

Sixteenth. It is a genl. rule yt. y party need not allege any thing more ym. will amt. prima facie to a sufft. cause of action.

y party pleading is not bound to anticipate what may possibly be asserted in defence.

e.g. It is sufft. for y. to declare yt. B. at such a time & place, ought to have paid him a sum of money. B. may have been an infant, still it does not alter y grounds of action.

2 Wils. 100. 2 Bover. 1007.

This rule does not hold with regard to pleas in abatement & estoppel. 10. Bagn. 400. 1 Lam. Et. 259.

8. Seventeenth. If y pleadings on one side express a material averment wh. y other omitted, it covers y omission. e.g. if Pltf. omits a necessary averment. & deft. allege such averment in defence he covers y Pltf's omission. The Pltf. avers yt. B. took a certain iron hook with avowing yt. he took it out of his possession. Now if B. instead of denying, pleads yt. tho. he did take it, ^{from the deft.} it covers y omission. 1 Tid. 184. Esp. 1. 388. Com. & Pl. c. 85. s. 37. B. 37. & Bac. 197. because in justification of act.

Eighteenth. y^{his} matter alleged in any stage of the proceedings after y declaration must conclude with a verification (i.e. true, paratise verification).

y^{his} matter is whatever is pleaded in avoidance on y one side, & in support of the allegations contained in y declaration on y other.

In ^{short} every thing except a complete denial.

y^{he} can't put him self upon his country.

The verification is y established mode of keeping a pleading open. 2 B. 228.

Aug. 58. Corp. 5/5. 23. 272.

see still a proportion (2 Wk. 30.10.) is understood.

By St. & Geo. 2^d. a bankrupt may plead bank-
ruptcy as a conclusion to a contrary country.

The swivelbutter is γ utmost limits
to ch. bleeding has been carried. 1. Laves. 103. -
2. Wik. 207. Corp. 575. 2. Beaver. 772. Doug. 38.
Laves 14. 19. 148. Ch. 243. 5. Vac. 5.

The object of each is to fortify wh. & last -ss. by re-
 citing what is advanced by his adversary.
 Co. Lit. 204. a. 206. b. 17. 18. Readings not answering these
 purposes are bad; for each party must abide
 by his original ground of action or defence.

Extra. 424. 25th. 1816. The pleading being terminated
whether they close in a conclusion or issue in fact
is not to be made up must always be given in a whole and
is not upon any single or detached part of it.

Thus, if γ Declaration & plea in bar are both
 valid & γ plea be answered to γ judgment must be given
 for γ Deft.; for γ plea the bar is good enough
 for γ Declaration & so thro' γ whole pleadings judgment
 will go vs. γ party on whose side γ first material
 defect appears. *id.* *Wash.* 1749. 1 *Laud.* 285.
3 Blk. 309. 2 *H. B.* 280. *Salk.* 173. *Hob.* 199. 8 *Co.* 120.
Ch. 249. *Holt.* 200. 8 *Co.* 135. 5, 6, 110. 4 *How.* 71, 31.

9.

Of the Declaration.

The Declaration & count are genlly treated in γ
 books as synonymous & when γ Deft. sues one
 only cause of action, & makes but one state-
 ment, they are. But when there are diff^t
 causes of action declared upon, or when diff^t
 statements are made of γ same cause of action, then
 each separate statement is called a count, & all
 the counts taken together form but one Declara-
 tion. *3 Blk.* 295.

When there is in fact but one cause of action
 yet the Deft. sets several counts. The object is to prepare
 for any possible contingency in witnesses, & to enable
 γ Deft. to recover upon one if he is unable to
 prove any of γ others.

If he can prove any one of γ counts
 he will be entitled to judgment, & will recover "se-
 cundum allegata et probata." *Holt.* 144.

The Decln being γ foundation
 of γ claim must state every fact wh. is mater-
 ial to γ cause of action, & these facts are called
 γ gist, for nothing can be proved wh. is not alle-
 ged, & unless every thing material is proved
 we can't have judgment. *Lives* 68. *Co. Lit.* 17. a.
Whit. 283.5. *Hob.* 179. 4 *Bac.* 135. 13.

If γ Decln contains any thing wh. shows
 that γ Deft. at γ commencement of γ suit had no

complete cause of action he can never have judgment in
y^e. action. 2 Lamm. 397. 7 Co. 24. 3. Plowd. 4. Co. 8. 325.
2 Bac. 3. Bro. J. 574.

Thus, - if in debt on bond, y^e p^lff. states; date
of y^e. bond, & y^e day of payt. after y^e date of y^e. writ, it
will appear on y^e face of y^e debt: y^e. p^lff. at y^e
commencement of y^e. suit had no cause of action,
unless he can prove y^e. y^e bond was deliv^d. at another
time. Bro. J. 574.

It judgment for y^e p^lff. in this case sh^d. be erroneous,
even after verdict y^e defect is incurable. Bro. J. 574.
Coys. 454. 2 Bk. 273. 7 T.R. 4. Doug. 61.

From what time a suit is sh^d. to be
commenced - see 2 Bk. 273. Coys. 454.

But if a party bound by a contract dis-
ables himself to perform, he may be sued be-
fore y^e time fixed, as if c^ovent. to convey
certain lands to D. in six months, & before y^e.
time he conveys them to C. Co. 1 3 Co. 21.

The omission of any fact wh. is essential to y^e 10.
right of action is an incurable defect.

The gist of action is that, with^out wh.
there can be no cause of action. In Assumpsit
"y^e consideration" in Trover "y^e conversion" is y^e gist.

5 Mod. 305. 4 Bac. 8. 3 Bk. 398. Doug. 678.
Respe^c "possession" is y^e gist &c.

In such cases the deft. has good cause to re-
mover; & if he sh^d. plead & judgment go vs. him,
he may accept judgment, or after judgment he may
bring a writ of error or reverse it. Doug. 678. or 18. 671.
58. 4 T.R. 411. 2. 7 Co. 10. v. 1 T.R. 645. 2 H. Bk. 574. 201.
3 Bk. 398. 4 Bac. 8. Con-4ig. H. C. 51.

It follows that when a p^lff's right
of action must accrue on y^e performance of a condi-
tion precedent y^e p^lff. must wait performance of y^e
condition or y^e. y^e deft. prevented him.

Thus if A. compromise B. to pay him \$100 on condition y^t. B. sh^d. build him a house. B. on suing for it, must state y^t. he has built y^e house, or y^t. A. prevented him from so doing.

The avermt. y^t. A. had not pd. y^e money with more wd. is insufficient. The omission wd. be incurable. 1 Laid. 319. 1 H. B. 254. East. 2038.

1 Chit. 509. 7 J. K. 125. Bac. P. B. 1.

But when y^e pl^{tf}'s right of action is qualified with a condition subseq^t. he is not bound to take notice of it. A condition subseq^t. is not material for y^e pl^{tf}. but for y^e de^{ft}. to aver upon.

Thus, in an action on a penal bond conditioned for y^e pay^t. of \$500, y^e pl^{tf}. is not bound to take any notice whatever of y^e condition but may rely upon y^e penal part of y^e bond.

Es/3. sig. 300. 1 Bow. Con. 259. 5 Co. 10. Hob. 88. 2 N. R. 80. a. 240. a. 1 Vent. 177. 2 y^e Mod. 309.

Comb. sig. Pl. C. 34. — — — 1 J. R. 638. 2 H. B. 574. 1 D. 254.

Again, when one sues on an instrument containing reciprocal (i.e.) independent cove^{ts}. or promises y^e pl^{tf}. need not aver performance of his contract but de^{ft}. must.

Thus if A. promise to pay money to B. in consideration of his promise to deliver goods. B. in suing need not aver delivery; y^e action is brought on y^e de^{ft}'s promise. But if A's promise was in consideration of B's deliv^y. goods, then the cove^t. is dependant & B. in suing must aver delivery, being y^e precedent condition. 1 Vent. 179. 2 Mod. 309. 5 Co. 10. 1 Bow. Con. 359. 4 Bac. 18. Cro. J. 645. Comb. 255. 3 B. K. 187. 1 Leves 232. Hob. 88. 2 N. R. 240. a. c.

Whenever previous notice to y^e de^{ft}. is y^e fact upon wh. y^e right of action is founded, y^e pl^{tf}. must

over it. Doug. 671.

Exceptions in the enacting clause of a Stat. must always be negatived in suing on a Stat. But exceptions in a separate substantive clause need not be. In y former case y exceptions form a part of y part of a description of y right, secured in y latter.

Exceptions in y body of a cont. must be negatived in y action on y contract, But exceptions in distinct substantive provision need not be.

Certainty. It is necessary that every decl. shd. contain certainty. This rule applies to all pleadings. 11.

It is necessary I. for y Deft. to know what to answer, & II. for a genl. issue to be formed. III. for y Ct. to know upon what to decide. IV. (which is instar omnium) that y Deft. may be able to plead y judgment in bar to any subsequent action for y same cause. 1 Day 315.

1 Co. 34. 1 Dorr. 2586; Dorr. Pl. D. 1. 272.

The certainty required extends to ^{y parties,} time, place, & subject-matter. Savoy. 1327. 1 Co. Lit. 303a. 3 Co. 35. Coop. 683. 3 Com. 27. 32. O'lood. 85. 122. Cro. E. 78. 97. 1 Inst. 272.

The questions upon these points have relation principally to y subject-matter.

In describing y subject-matter taken y Law requires no greater certainty than y subject will reasonably admit. E.g. - 9th. hist. an action vs. B. for a certain ship & sails.

This was all y description given, but y Ct. adjudged it sufft. 2 Saund. 74. 3 Co. 35. Cro. E. 8. 17. 412. Hall. 628. La. R. 588. 410. So in "Prover" for books, y description stated only "a library of books" yet this was held sufft.

E. converse. An action was brought for "some fish" & in y declaration they were termed "a lot of fish". This was held to be insufft.

Again "7 pieces of linen" was held not to be sufft. description. 5 Co. 21. J. G. thinks it better than "a ship & sails". (so two sheaves of corn)*

In applying this rule of certainty, y subject must in genl. be referred to the good sense of y Ct. The Cts. in modern times are more liberal than they formerly were in exacting certainty. 2 Linds. 71.

Id. Ray. 388. 1410. Doug. 315. 5 Co. 34. Tra. 627.

Bro. E. 817. 5 Prae. 272. Talk. 228. Bro. E. 866.

2 Moos. 213.

It is d. to be sufft. if y jury can know from y description what is meant. Bro. E. 877. 1 Vent. 53. 5 Prae. 198.

In alleging matter of inducement, or aggravation y rule is less strict, neither of these is y gist of y action, & is never traversable. Laves. 71. 178.

Matter of inducement is y. wh. is introductory to y principal or material subject.

Laves 66. tho not d. itself, the gist of y action.

Matter of aggravation is y. wh. shows y circumstances of enormity wh. attend the action. Laves 70. 118.

The loss & finding in "Trove" are but matter of inducement. In "assault & Battery" threatening words & gestures are matter of aggravation - The one is explanatory, & other additional tending to enhance y damages. Laves 66. 72. 118.

In case of tort, there may be circumstances of aggravation wh. wd. enhance y damages. In ^{assault} tort. there is, strictly speaking, no matter of aggravation.

But to return to y subject of certainty, There are
in y forms of pleading certain words continually
recurring such as "said" "aforesaid" "before mentioned"
&c. sh. do not import a suff. degree of certainty,
if there is more than one antecedent to sh. they may
refer, & in such case y word "just" or "last" sh.
be used. 3. T. R. 178. 2 East 66. 2 Ld. Rayd. 888.

E.g. Suppose there were two counties
mentioned, & y expression was y "aforesd. county"
ys. wd. not be suffic. certain. To render it suff.
certain, y expression sh. be "first aforesd." or "last
aforesd." as y case may be. Com. Dig. Pl. C. 18.
8 T. R. 178. Bro. C. 267.

A declaration may be ill in part for want
of certainty, & good for y residue, tho there be
but one count. E.g. suppose in y actn. for
"Rent broken" 2 branches are assigned, - one suff.
certain, y other not, - he may recover on one tho
not on y other. 2 Ld. R. 379. 1 Tulk. 218.

1 Ld. R. 286. a. Com. Dig. Pl. C. 32.

This rule is "a fortiori" true where there more
than one count. So in "Trove". -

Advantage can't regularly be taken if y mis-
take in y actn. by plea in abatement. but y deft.
sh. recover. 4 Bac. 8. Tulk. 212. 223. 1 Bac. 15.

1 Show. 91.

If one declares on a cont., to y validity of 12.
sh. a deed is necessary by y com. law, y deed itself
must be alleged & he must describe.

So if he pleads a release, he must plead the
writing sh. is necessary to y validity of y re-
lease.

This is necessary by y rule sh. re-
quires each party to plead what is essential
to his cause of action or defence.

Now by y C. L. a deed is necessary to y transfer of an in-
corporeal right. 3 Co. 43. b. 38. 2 Wils. 376. 12 Mod. 530.
Tulk. 314. Bull 279. Cowp. 259. 4 Bac. 656.

The rule is y same when y cont. on conveyance is pleaded, wh. is unknown to y C. L. But wh. is required by St. Law to be written. The must plead y instrument. wh. is y foundation of his claim & withth wh. his pleading is bad, as y writing is y essential part of y case, ib. et bosp. 287.

But in declaring upon a cont. wh. is good at C. L. withth writing, wh. tamen is reqd. by St. to be in writing, he is not bound to plead y writing or even mention it, for it will be sufft. if he produce it in evid. - & it is altogether unnecessary like to do so. 1 Bac. 75. 4 Nils. 685. 2 Burr.

1890. 12 Mod. 540. bosp. 289. Bull. 275⁵³. Salk. 519.

1 Root. 77. Nils. 146. 4 Bac. 655. 6. Rot. H. 4 m. 202. 4.

In this latter case, y writing required by y Stat. is not an instrmt founding y action, but mere evid. of y parol wh. is y foundation.

As it was not necessary at C. L. that y cont. shd. be in writing & as y St. requires it as mere evid. - y rule of y C. L. remains y same, for y St. has introduced no new rule of pleadings, but has only altered y rule of evid.

If tamen such argumt. be pleaded in bar, it must be avowed to be in writing, because greater strictness is required in pleas in bar than in decls; for y plea in bar acknowledges y right of action in y Pltff. unless y right be taken away by y plea itself. Rayd. 450. Salk. 519.

If in an action on a cont. within y Stat. of frauds &c. y deft. demurs, y Ct. will presume yt. y cont. declares upon, is in writing, for by such demurrers y deft. avows & must allow yt. there is such a writing. It stands confessed, since y fact of demurrer shuts out y Pltff. from producing evid. of y fact. 7 T. R. 351. n. 531. Salk. 519. Bull. 279.

Rayd. 450. bosp. 289. 12 Mod. 540. 1 Bac. 74.

A declaration may be either genl. or special, & y diff. consists in y generality or particularity of y statements.

It is genl. for example, when y plff. in debt on bond sets out y penal part only. But when he states y particulars of y bond as y consider. he makes a special declaration. Bac. Pl. 3. 1.

"System of Pleading" or "Doctrina Placitandi" 84.

A plff. in declaring on a Verdict is not bound to state any more of it than is necessy. for him to recover.

A cont. may contain various stipulations, it may contract to pay B. a sum of money in one, & in another to convey certain lands.

Of these, y plff. is bound to state only those on wh. he sues. Doug. 644. Loc. plac. 84.

In y action of "assumpsit" it has been questioned whether y particular word "promise" is not necessy. but it has been very properly determined yt. y word "agreed" is sufft.

It is extremely capitious to hold to any distinction between "promised" & "agreed"

2 N. Rep. 62. 3 Mass. 160. Talk. 663

1 Leon. 164. Id. Rayd. 1517. Cro. E. 913.

Joinder of Parties in one Declⁿ as Plffs.

1. Where two or more persons are jointly interested in a right to be asserted by actn. they may, & regularly ought to join as Plffs.

If a promise is made to J. & B. & is broken, they must join as Plffs. in an action to enforce it, or y action will not be on y promise.

1 Saund. 133. 291. 5 Co. 18. b. 19 a. Co. Lit. 164.

5 T. R. 651.

Formerly joint tenants, co-parceners & tenants in common, were required, in all actions relating to their joint estates, to join.

13.

This Rule has been acknowledged on all hands till lately, for if injury being joint & remedy shd. be so too.

But it has been decided once in Eng. & once in N. Y. yt. such a joining is optional with them, either all may sue or one.

This rule has been adopted on account of its being more convenient, tho' all allow yt. the law was formerly sever. 12 East. 57. 81. 2 Cairns 169.

This modern rule in Eng. & N. Y. has always been the rule in Conn.

2. When a right ^{vested} ~~vested~~ to be asserted by suit, is vested in an individual only, another is not allowed to join.) So one but if injured party has a right to bring an action, & if others die, the deft. wd. not be liable to them. Secus any man might be joined by all his neighbours, or the whole human race.

It is impossible for one person who has a sole right of action to join another with him & enable him to recover tho' he has suffered no injury; for an action must go in favour of both or neither.

Bro. E. 657. 143. 1 Leon. 215.

The misjoinder in such a case may be taken advantage of under a genl. issue or it is pleadable in abatement. 1 Lev. 315. 1 Comb. 1. 2. 13.

In an action by Exors. as such all must join as p^{ar}ts. even tho' one is under age or shd. refuse an office. 1 Lams. 291. 41. 1 Ark. 327. 960.

Yelv. 120. Vent. 95. 10th. on Exors. 446.

This is in accordance with the 1st genl. rule. Their interest is joint. 9 Co. 37.

If an executor is omitted & omission is pleasurable in abatement only, & if an exec. refuse to join, & does not appear, he must be summoned & severed.

Bro. C. 420. Bro. Eliz. 512. 1 Lound. 291. g.

3. As a converse of y^e genl. rule, if 2 two or more persons' several rights are violated even by y^e same act, they can't join. e.g. If A. by mis-charge of a gun shd. kill y^e horse of B. & C. B. & C. can't join in an action vs. A.

I gain if J. T. say y^e A. & B. are both thieves, they can't sue in a joint action, for their reputations are several & diff't. Bro. C. 512. resp. rig.

504. Bull. 5. 2 Wils. 427. 2 Lound. 285. 1 Comb. 198.

Yelv. 124. 1 Bac. 511. 4 Bac. 10.

4. If there are two or more covenants or obligees or promises, & one dies, y^e other entire right to sue at law survives to y^e other (i.e.) remains to the survivor. The exec. of y^e deceased obligee can't be joined with him, for death has severed y^e joint right at law, tho' before y^e death of either, they shd. have joined in an action upon y^e bond. 14.

(The survivor however is obliged to acct. to y^e exec. of y^e other, for y^e part due to y^e decd. obligee.)

The same rule holds with regards to joint creditors of any kind.

1 East. 497. 1 B. & P. 445.

If a covt. is made with two persons severally, and their interests are several, each on his death transmits his interest to his representative. ib.

The same rule holds where two persons are interested jointly and severally.

(ib. aucts.)

Joinder of Parties in one Suetⁿ as Defts.

Where a cause of action arises out of a joint act or default of two or more persons, they may be joined as Defts.

Where a cause of action arises "ex contractu" they must be joined; - but when "ex delicto" they may either be joined or severed at a election of a party injured; for torts may either be joint or several, but a violation of a joint contract is joint only. "Hob. & Latch. 302. Bac. Pl. 213.

4 Bac. 10. 584. 117. Bull. 5.

As to what is a tort see Bull. 5.

If 2 persons join in publishing a libel they may as Defts. be joined or severed. 2 Ld. Rd. 199. 2 Burr. 988.

But when there are distinct torts committed by diff. persons in several acts they can't be joined. So can 2 persons be joined in an action for torts committed by them severally, e.g. if A. & B. (tho pass upon a land of C. at a same time or place) ^{say that C. is a thief} they can't be joined in an action, for speaking is an act in wh. 2 can't join, tho they may be joined in a libel.

If A. & B. bind themselves in a contr. they must join.

As further if one is injured by 2 several acts of 2 or more persons at diff. times they can't be joined. Bac. Pl. 10. 2. Polm. 313. Cro. J. 544. 1 Bulst. 2.

20p. sig. 504. 2 Vern. 99. Talk. 393. Bull. 5. Str. 133.

Where two or more join in a contract they must be sued jointly. 4 Bac. 10.

15. When 2 or more are entrusted in a contr. jointly & severally, they may as Defts. be joined or severed at a election of a Plffs.

But if there were 4 (e.g.) 2 Es. not be joined with 2 rest, for this Es. be treating 2 contr. partly joint & partly several, & there are no such contrs.

known to y law, 12 Geo. 2. 5. 6. 1. Lando. 221. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

303 ac. 697. "Det. Oblig."

1 Tue. 238.

If 2 or more bind themselves by one cont. it is joint
or converse. by y terms of y cont. it is several.

Thus if 2 or more make a promissory note in these
words "we promise &c." with 2 more, it is joint only
if not several. 303 ac. 697. 294th. 31. 64. 33. 175.

Bower. 2611. 174. 33. 336.

If 2 persons enter into a joint bond, or one die, his
execr is not liable at L. to be joined with y obligor
in an action on y bond. He can neither be sued alone
nor jointly with y survivor. As it respects y creditor
his legal remedy is confined to y surviving debtor,
what he has paid for his testator. 1 East 400.

But if 2 or more persons bind themselves jointly
if severally y effect is y same as if they bind
themselves distinctly & separately. Hence y execr
may be sued separately but not jointly.

1 Lando. 271. 291g. 1 Lando 161.

Com. 29. Abatnt. 10. 3 T. R. 557.

Where an action is not vs. execr. those only can be
sued, who have accepted y trust, but y plff. is
bound to join all those who are engaged in admin-
istering y estate. 1 Lando. 299.

Joint causes of Action.

Where several causes of action are of y same nature
& between y same parties they may be joined in y
declaration. Each distinct cause of action must be

alleged tamen, in a distinct count. *Coulb. sup.* 233.

Bac. Pl. B. 3. 4 Bac. 11

Com. sup. act. 3.

By "actions of y same nature" is meant those wh. at C. L. require y same sort of judgment. By C. L. there are in civil actions 2 species of judgment, viz. a "capiative" & a "misericordia".

Whenever a deft. is convicted at C. L. of a tort committed "vi et armis": y judgment is a "capiative" i.e. let him be seized & imprisoned until he has paid his fine for y breach of y King's peace.

& converso where y party is subjected on a cont. or for a wrong, not committed with force, y judgment is a "misericordia" i.e. let him be amerced. *Doug.* 625.

Now where there are several causes of action requiring diff. judgments at C. L. they can't be joined in one declaration. *3 Bac. 191. Bac. Pl. B. 3.*

4 Bac. 11. Hob. 177. Doug. 632.

1 Vent 365. 2 Wils. 219. Bac. 30.

Thus debt on bonds & debt on simple cont. may be joined in one declaration, in diff. counts, tamen,

1 R. 275. 1 Wils. 230. 319.

1 Vent. 360.

I think debt on bonds &c. may be joined with a promissory note, tho. I have never met with an instance.

It is an elementary principle that there can be but one final judgment rendered, & there is no judgment known to y law wh. unites these 2 species. Hence

of necessity of the last mentioned rule. Bro. Car. 20. 1 Wils. 252.

The first branch, or off. one of the genl. rule, though true, is not universally so. 1 T.R. 276. 1 Wils. 252.

It is true tamen, yt. when several causes of action require the same facts & same genl. issue, & are between the same parties, they may always be joined.

When A. sues in 2 or more bonds vs. B. they are not only of the same nature, but require also the same plea "non est factum", & they may be joined in one declaration in so many diff. counts.

1 Vent. 366. 1 Wils. 252. 2 ib. 272.

Bro. Car. 20. Salk. 10. 1 T.R. 274.

Whenever joinder is admitted it is presupposed yt. the p'ty. sued, & deft. is sued in one and the same right of action, character & capacity.

But where he sues in a diff. capacity, the above rule does not hold. 3 T.R. 347. for there wd. be a misjoinder of counts, & I shd. think of parties.

e.g. p'ty. sued, & deft. is sued in one count in his own name & capacity, & in another count as execr. there is a misjoinder.

1 Wils. 191. a. 10 Mod. 216. Salk. 10.

1 T.R. 488. 3 Hob. 659.

Our books leave it as a doubtful point whether an "ejectmt. & assault & Battery" may be joined.

Holt. 249. Bac. 12. I conclude they can't from rules peculiar to the action of ejectmt. & the fact yt. nominal p'ty. is not the real one, & the real p'ty. in ejectmt. will not, & can't appear upon the record to be the same person as the p'ty. in the other count.

If this case is not an exception to the last genl. rule wh. perhaps strictly speaking

is not, then the rule is universal Hob. 242. Bac. Pl. 33.

5 Co. 72. 10 Bl. R. 848. 1 Wils. 252. 2 ib. 318.

3 D. R. 347. 1 East 70. 1 Kent 225.

Sub. trespass on the case may be joined in one decl. ib.

"Grover" & "Slender" may be joined in one decl. &
to these may be added action for "malicious
prosecution" & libel in diff. counts. 10 Cr. 632.

So, for neglect, fraud, nuisance, &c. &c.

10 Cr. 632.

When diff. causes of action require same judge,
but diff. pleadings, they may only, but not
universally be joined. Thus "debt & detinue" may
be joined in one decl. so, debt on bond & debt
on simple cont. may be joined &c.

The reason is y^t. by 7 C. L. 3
judges are of same tho. y^e pleadings are diff. (i.e. y^e
first is a "misericordia") To this rule there are various
exceptions.

An action of "detinue" has generally been considered
as sounding in tort. L. J. thinks tamen, it does
not, 10 Cr. 632. 10 Bl. R. 848. 1 Kent, 366. 4 Bac. 11.

Diff. causes of actions tho. of same
nature accruing by y^e same person but in diff.
capacities can't be joined. Hob. 88. 10 Cr. 632. 190.

As one can't sue in "assumpsit" for money had
& received on his own acct. & on acct. of another,
(as ex³)

Thus y^e pl^{ty}. claims in 2 diff. capacities. The
person is y^e same but y^e capacities are diff.
This is a misjoinder of counts, not of causes of action.

The case is analogous to 2 rights of ac-
tion existing in favour of 2 distinct persons.

In y^e one he sues as a private individual;
in y^e other, as ex³ of a corps person. The legal
capacity is in 2 diff. persons. 1 D. R. 458. 10 Cr. 10.

3 T.R. 655. 4 ib. 280. 2 B. & P. 217. 1 Wils. 191. Garth. 295. Sta. 1271.
3 B. & P. 7

Money had & received to y use of y p'ty. or exc. may
be joined with a count for money had & received
to y use of y testator. The money belongs to y
same bond, nominally 2 diff. capacities, but
actually y same. 3 East 104. 3 T.R. 659.

E. conveyo, The rule yt. causes of action diff. in
their nature cant be joined if universal.

Doug. 582. 2 Wils. 317.

Contracts & Trespases cant be joined, - here the
Liability & gen. issue are both diff.

13 ac. 30. 10th. 10.

Can trespas "vi et armis" be joined with 18.
trespas "ex delicto" much more "ex contractu" than
y judgt. at C. L. is diff. in trespas "vi et armis"
& "ex delicto" The judgt. is diff. but y plea is y
same.

This is an exception to y affirmative branch of y
genl. rule. Garth. 189. 5 Mod. 90. Bac. 26. 6

or 32 S. Ray. 253. 2 Wils. 319. Kent 356.

Le. Rel. 58. 2 Burr. 1114. 2 Lev. 161.

Counts & torts of any kind can never be joined in
y same declr. & yet in torts not committed
with force y judgt. is y same, but y genl.
issue is very diff. 10th. 10. 13 ac. 30.

"Debt & act." cant be joined tho requiring the
same judgt. The pleas are diff. as well as y
genl. issue, & y proceedings are entirely diff. 4. Bac. 11.
1 Bac. 21. 1 Mod. 42.

An action & acct. can never be joined, ~~the~~ requir-
ing a same judgment. (The pleas are diff't. as
well as a genl. issue) with any other whatever.
There are two judgments to be given in an action
& acct. The proceedings are "sui generis".

An issue in "debt" is to be tried by a jury,
whereas an action & acct. is to be tried before
a judge. It is absolutely impossible to join.

The principal issue is joined & tried before a
diff't. persons. 1 Mod. 42. Bac. 26.

Bac. 21. 4 Bac. 11.

The same rules of Joinder may be found under
3 following.

I. When 2 diff't. causes of action require a
same judgment & a same genl. issue, they may be
joined with a same genl. issue exception, provi-
ded the parties are the same in both, & sue & are
sued in the same capacity.

II. In genl. 2 diff't. causes of action may be
joined even if 2 genl. issues are diff't., provided
they require a same judgment at C. L., & the parties
are the same. This rule however is not universal.

III. Where 2 judgments ^{alone} required, by C. L. are
diff't. they can never be joined, it ^{is} ^{for time} when
with a judgment & genl. issues are diff't. they can't.

Where 2 causes of action as in their nature may be
joined, there may still be a misjoinder of counts.

e.g. Count as an Administrator for money received
by him as such, joined with a count on a prom-
ise by intestate. 1 H. Bl. 108.

There is a misjoinder, for they require diff't.

Judgt. one "de bonis propriis", other "de bonis test-
atoris". 4 T.R. 347.

You can plfff. join a cause of action accruing
in his own right with one accruing ex bono & neco.
in one count, for he is liable for expts in y one
cause & not in y other. 4 T.R. 380. 11b. 489.

Ita. 1271. 3 B. 347.

The improper joinder of several causes of action
is called misjoinder of actions.

A misjoinder ^{of causes of action} is very diff. from duplici-
ty tho' often confounded. It is worse than dup- 19.
licity. It consists in improperly joining diff.
causes of action (as I have stated, in diff. counts,
to assert diff. substantial rights) & to enforce
diff. & distinct rights of recovery.

A duplicity in a decln. consists in joining diff.
causes of action in one & y same count. to en-
force one entire right of recovery. Thus if a plfff.
in suing on a note of hand shd. insert this
claim & also a charge of fraud in y same count,
Err. Dig. Plea. c. 33.

The joining of several causes of action in decln.
sh. according to those distinctions shd. not be joined
is an incurable fault. The deft. may safely
demur, or arragt y judgt., or obtain a writ of er-
ror.

The reason why a misjoinder is fatal is this. In
no action can there be more than one final judgt.
If then y plfff. obtain judgt. on both counts &
claim judgt. in both, he can't have them, for a
judgt. adapted to one count is not to y other.

§ 7. Ct. have no right to select one judge, rather
you another, 144. 136. 107. 1 Salk. 10. Carth. 436.

3. Leon. 188. Sta. 48. 200. Carth. 113.

49 Bac. 11. Ld. Rayd. 1032. & 7. R. 166.

It has been a great question whether a decl.
in trespass, wh. asserts yt. a Deft. entered "vi-
et armis" & pliff's. 342, cause & beat his servt.
whereby he lost their service, is a good decl.

It is now well settled yt. it is good, & yt. a
allegation of beating his servt. & consequent
in damages by loss of yr service is to be re-
garded as mere matter of aggravation attendant
upon a true cause of action. So there is not in
reality any misjoinder. 3 Wils. 20. 2 ib. 313.

2 J. R. 167. 3 ib. 292. Salk. 642.

144. 136. 333. Bac. pl. 13. 3.

Carth. 113. Sta. 200. 43.

If this for good &c. were omitted, & decl. wd.
still be good & Ct. wd. consider y. whole charge
as containing but one cause of action. But in
such a pliff. es. not recover any consequential
damage arising from y beating of his servt.
Salk. 462.

When there are several causes of action, between
y same parties wh. admit of being joined in
one decl. y joining of them is not imperative
but optional. He may join or bring several actions.
In such case y Ct. may compel
a joinder.

This is a discretionary proceeding. There is no law
rule regulating it; But where y causes are of y
same nature depending upon y same evidence they
will go by order or consolidation. Comb. 244.

This is to prevent a deft. from being unnecessarily bur-
thened with costs, & perhaps with a multiplicity of
suits. 2 J.R. 639. 2 Sta. 1145. 78. 4 Bac. 11 "idem".

When a consolidation is thus effected a plff. must
pay all the costs accruing from the application, & he
is regarded as having vexed a deft. with unnece-
ssary suits in order to make him costs.

1 Ch. Pl. 196. 1 B. & P. 157. 2 ib. 77.

2 J.R. 639.

According to later opinions, in case of misjoinder,
a plff. may, on payt. of costs be permitted
to amend by striking out one or more of the counts.

1 Lard. 285. n.

"That wh. is put out of a decl. is 'not pros.'"

1 H. Bl. 108.

Before demurrer he may as to one enter a
"not pros." & it seems now by the later opinions that
he may enter a "not pros." & amend by strik-
ing one after demurrer.

4 J.R. 357. 360. 1 H. Bl. 108. 1 Lard. 35. n. 1 B. & P. 47.

The rule was formerly that after a mis-
joinder had been removed to, a plff. could not enter
a "not pros." 1 H. Bl. 108. 4 J.R. 357.

The doctrine of misjoinder has been stated to re-
pend upon the diversity of fidegt.

In Court. however, there is neither
"cupidation" nor "misericordia", & yet the rule of
misjoinder obtains here as well as elsewhere.

They are necessary in order to preserve a dis-
tinction between the different causes of action.

In other States, & in Eng. now, all fidegt. are of
"misericordia". 5 Bac. 121. 191.

Miscellaneous Rules.

The declr. must agree with y writ, for y writ is y foundation of all y subseqt. process.

The writ commences y cause of action in genl. terms. The declr. amplifies upon it. The declr. must ergo agree with y writ, lest y writ express one cause of action & y declr. another.

It shew y writ entitled y actn "trespass" y plff. can't release in "case", for yt. sh. be a fatal variance. (Bac & Studt & one of gold-est. books we have but of very good authrity.)

4 Bac. 12. 3 Bac. 26. 64. Bro. C. 325. Hob. 180.

The rule & practice in engd. will not allow y doct. to make capricious exceptions.

When a declr. does not agree with y writ, y diversity is called a variance.

21.

It has been sh. yt. those faults wh. constitute y gist of y action must be directly & positively alleged. If it was stated "thence" &c. it was bad pleading & sh. not to be aided by verdict. 4 Bac. 222. 5 Com. 45. Co. Lit. 303.

2. Lev. 206. Bro. J. 501. Talk. 556.

19 Mass. 98. vide Esp. C. 210. 5 Bac. 192.

24th. 621. 118th. 205. 100. 92.

This rule has been somewhat relaxed of late. 2 Mass 261. - Where it now ill except on special demurrer. Esp. C. 210. 29 Mass. 350. 1 Wils. 99.

It does not attain to yt. certainty wh. is required. The language of a good plea can never be mistaken. 1 Hae. 521. 4 Bac. 26. 5 Co. Lit. 303. 2 Wils. 20

Talk. 626.

It has been decided yt. a verdict for 3 jlls. in such cases wd. not cure, had decl. for what is y objection to it? It is only form. The circumstances may all have been clearly and accurately stated tho not in y form required.

yt decl. stating yt at a certain time & place B. ought to have pd. a certain sum of money, to wit on &c. is good pleading. 2 Wils. 358.

1 Lando. 169. 216. 291. 1 Stra. 232. 493.

Lawes 148. Bro. & L. 58. 20. App. 2. 316.

The rule requiring material facts to be distinctly & positively stated does not hold as to y decl. of any facts however important or material they may be, unless they are directly traversable by plea. e.g. in trespass y decl. need not contain a complete or distinct operation of jlls. proposition. It is suff. if y word "whereas" is used as y fact, if proposition is not by itself traversable distinctly. The genl. issue "not guilty" denies y fact. (Co. Lit. 105. * 2 Salk. 656. 2 Lev. 216 Stra. 621. 4 Bac. "Blay B.S.")

Again in declaring in "assumpsit", y consideration is y gist of y action, & yet it is never distinctly & positively alleged.

Again at Co. L. a man is liable for mischief done by his animals provided he had previous notice of their bad habits, yet y scienter notice is never distinctly alleged, for it is not distinctly traversable, but is answered by the genl. issue.

For this qualification of y rule I am personally liable, as it is not so laid down in y books 456. 106.

Bro. E. 202.1. Com. D. Pl. 94. Bac. Pl. B. 4. & Co. 18. C.
& Bac. 15.22. 10 Co. 77. Hobt. 5.18. Bro. C. 116.1 Landed, 189.
190.2.

For precedents see Chy. Pleasim & Pleaders App. 5.
10.

This rule requiring material facts to be alleged,
does not hold with regard to inducements, for these
are not traversable. 3. Eph. 117. Yelv. 20 Laves 71.2. 118.
Bac. 15.14. Indeed they are not within let-
in of a rule not being a gist of an action.
Laves 71. 118.

But this rule does not hold when
a gen. issue will not involve a denial of a
material fact in question, in wh. cases the
facts must be stated in direct & positive
terms.

The facts must be distinctly traversable.

Laves 71. 118. & Bac. 15. (e.g.) the
"boot Broken" when there is a condition prece-
dent, it must be distinctly avowed, for "non
est factum" does not deny a fact of performance.

The averment of performance may also be dis-
tinctly traversed, & for this reason must be pos-
itive & direct.

If a debt is in part good & for any cause bad
in part, & a debt. removes to a whole, a plff. may
recover on a good part provided yt. part contains
a complete cause of action. Hobt. 178. Bro. 7. 104.
10 Co. 115. The Regd. 395. 1 Landed. 280. n. 200. 379.

Suppose plff. sues on a bond & in 2 counts &
it appears one was not due when a suit com-
menced & a debt. removes, plff. may still recover

on 3 other bads. Lawes 59. Bac. Pl. v. 6. 1 Lound. 283. n.
86. 2 ib. 379. 4 Bac. 25. Cro. J. 104. Hob. 178. 1 Roll 784.
10 Co. 115. Yelv. 145. La. Rayd. 395.

The last rule holds in all cases where there are
2 counts & one good & other bad. 1 Lound. 285.

Suppose there are 2 counts for slander
one for calling y plff. a "fellow & other a "dandy".
he might recover upon one, tho not upon y
other, for they are both of same nature, tho
not both true. The badness of y one does not vi-
tiate y other. There is no misjoinder, there
is only an insufft. count in y some facts with
a sufft. one. Com. D. C. 22. 256. F. 28. 2. 3.

See a distinction 11 Co. 45 b. Dec. as to y
reason 1 Lawes 288. 6 Yelv. 8. 259. 60. for there being
one good count there is a sufft. cause of action.
The declr. ergo in demurrer must
be adjudged good.

When there are n counts & one good & other bad
& y deft. instead of demurring pleads y genl. issue
& y jury find a genl. verdict for y whole decr
& plff. can't have judgment.

The deft. may arrest judgment. The Ct.
sh. go to render judgment. Verdict, & can't know how much
of y damages were assessed upon y good count &
how much upon y bad one, & y Ct. will call a
new jury, & award damages on y good count only.

Pull. 8. 2 Wils. 177.

In cont. The Ct. of errors have altered this rule re-
liberately; but for what good or sufft. reason I
am not aware. For reason of y rule see
Cro. J. 104. Hob. 178. 11 Co. 130. 2 Brown. 918. 24 Bl. 318.
Doug. 696. 791. 1 T. R. 508. 32. Esp. 8. 316. 1 Wils. 171.
2 Lound. 171 a. 1 Halk. 384.

The Ct. have no way of determining whether
y verdict when it is a genl. one given on ally
counts is obtained from y good or bad counts &
y jury are not supposed to know whether they
are good or not, ergo it seems expedient & proper
yt. y plff. shd. not be allowed to recover on y
bad count, & yt. there shd. be a new jury to
award damages arising on y good. 2 Bac. 74, 572.

Bulst. 3. 10 Co. 190. 2 Laim. 171.

3 Wils. 177.

If y jury shd. find a verdict upon both counts
separately & assess damages upon each distinct
one, judgt. on y good count cant be arrested.
The reason is perfectly obvious; The Ct. know
how much was assessed upon y good & how much
upon y bad. 3 Wils. 177. Cro. J. 103. Hob. 178.

Cro. E. 785. 1 Roll. 526. 1 Bulst. 77.

1 T. R. 532. 508.

(This holds in civil not in criminal cases. 2 Burr. 985. Falk. 285.

If y jury do not find upon each count where it
appears upon y record how much is due, judgt.
cant be arrested. Cro. J. 174. Hobt. 178.

Thus if a plff. sues upon 2 bonds & in 2 counts
& y jury return a verdict of \$100 & it appears
from y records yt. one was not due, y Ct. have
authenticated means of determining how much was
given on y remaining count.

Again if some of y facts alleged in one count
are actionable & others not so, & a genl. verdict
is given y plff. is entitled to judgt.

Suppose for example yt. a person says to you
in words, to wit "he is a felon & a cheat"; first

being actionable & 3 22, not 3 genl. verdict, vd. hold.
2 Landed. 1710. 1 Roll 370. Cro. E. 328. 788. For they will
be deemed to have been spoken at one time.

2 Landed. 171. 1 Roll. 175.

1 Bulst. 37. 77.

The declr. is now closed.

Dilatory Pleas.

25.

Formerly they were used witht. any foundation
in truth & merely for delay. 3 Bl. 302.

They never affect 7 merits of 4 case. 5 Wils. 51.

By St. 48 5 June, no dilatory pleas
are accepted yt. are not accompanied with an
affidavit in some circumstance sh. shd. render them
evidently proper or expedient, or true. Prac. Pl. 3. 1. 2
(No such stat. or rule of practice in Court.) 4 Bac. 35. n. 51.

Pleas
Dilatory.

I. The first Dilatory pleas are to 3 jurisdiction
of 4 Court. The grounds are various. The pty.
may plead yt. he is privileged not to be tried to the
by yt. Ct. Jurisdiction

In Eng. they have diff. gradations of Atty. assign-
ed to diff. Cts. It is a good plea in Westm.
Hall yt. 4 pty. is atty. in another Ct. If 4 atty.
is sent jointly with another, he can't plead his
privilege. He must plead it in his own right. Privilege
1 Com. 3. 4 Bac. 36. Cro. E. 385.

Hob. 117. 87. 3 Blk. 301.

Cart. 11. 384.

It is a good plea to 3 jurisdiction yt. where a Ct.
is limited in its local extent, 4 cause of action
arise out of its limits. Ex. City Courts. 4 Bac. 36. Local
Extent.

Cart. 11. 384. 3 Bl. 310. Jalk. 344.

We have no Counts of this kind except ^{city} Cts.
By 7 charter of 7 Cts. of G.D. Haven 7 corpora-
tion have a right to organize Cts. within certain
limits. If a cause of action arose out of those
limits, it wd. be a good plea to 7 jurisdiction
of 7 Cts.

Again, when 7 Cts. sued in, has no jurisdic-
tion as to 7 subject-matter, it is a good plea
to 7 jurisdiction.

When 7 Cts. ~~sued~~ has no jurisdiction as to the sub-
ject-matter it is impossible for 7 deft. to plead his
plea. 1 East 352. 10 Co. 689. 1 Vent. 333. 13 ac. 2. 11. 182.

He is under no necessity of pleading 7 juris-
diction at all. He may take exception at any
stage of 7 proceedings, & 7 Cts. in discovering it
is bound to dismiss 7 cause.

E.g. Suppose an indictment in
a criminal case found & prosecution in 7 Cts. of
common pleas, in Eng. this Cts. having no
jurisdiction in criminal cases - if J. dgt. were
rendered 7 proceeding afterwards wd. be a trespass.

In fact it is unnecessary in this case to plead to
7 jurisdiction, 7 proceedings are "coram non-judice"
& void. 1 East 352. 4 Bac. 25. 1 Vent. 333. 10. Co. 689.

26.

In an action 7t. was local 7, fact 7t. it
was not in a wrong county. It. be a good plea
to 7 jurisdiction or if it was not in a foreign
country. All actions 7t. are not local are transitory.

As if damages are separately assessed upon
each count in sh. case 7 plts. can have J. dgt.
upon those assessed on 7 good count only.

When, & decl. is good in part & in part ill, if & good part does not contain a complete cause of action, the effect must be & same as if it were ill in every part.

And this of course must always be the case, but where there is but one indivisible ground of claim, & it defective or ill, laid in any part, for in such case & decl. itself does not show any complete right of recovery. 4 Bac. 25.

E.g. Decl. in "assumpsit", prom-
ise well laid, but & consideration not so.

Secus in "Trove" for two things, one sufft. descri-
bed, & other not. There are two distinct grounds
of claim, of wh. one is a sufft. cause of action.

If a plea to a decl. is bad in part it is so
in toto. Term. dig. Pl. 2. 36. J. 25. 1 Term. 28. n. 337.
rib. 45. Gholke. 912. for an entire plea can't
be divided being pleaded as an answer to
whole, if it is not in law a defence to & whole
it is no legal defence, at all.

If & giving supps greater damages than & plth.
demands he may release & surplus & take
judgt. for & rest. 11 Co. 15. 5 Bac. 195. 272.
Leath. 19. 27. 2 Bac. 123.
4 Bac. 25. Mod. 28. 2 J.R. 113. 123.
174. B. 213. n 9 J. Esp. 204. 174. 564.

Or & Lt. to prevent error may witht. a re-
lease give judgt. for & residue alone. 4 Bac. 25.

But if judgt. is given for & whole it is Error.
vice versa of judgt. post.

So if & plth. demands more than by his own showing
he is entitled to, & & giving find more, he may re-
strict & except & take judgt. for & residue. 4 Bac. 26.
1 Roll. 235. Stra. 175. 5 Bac. 195.

So after a demurrer, 1 Lound. 282. 285. n.
For exception to this rule, see 1 Benc. Pl. C. 56. 7 Mod. 87.
Black. 558. 2d. 224. 813

Sum when aided by plea is not bad. Ben. 885.
8 Co. 120 a. 1 Co. 215. Lawes.

When an action is however transitory it is no
plea even in a foreign country. The action
may be brought on by a fiction. 1 Stra. 512.
Coop. 161. 175. 2 Bl. R. 1058.
2 H. Bl. 145. 81. 1 H. Bl. 146.

Suppose A. brings an action at Westminster 1703.
on a bond executed at Philadelphia M. S. H. in 3 parish of Mary-
lebone. London. 2d. R. 1532. 4 T. R. 503.

Actions are local in the following cases.

1st Whenever a judgt. of a Ct. must be in rem i.e.
whenever a Ct. applies directly to a property.

All real actions require a judgt. "in rem"
as objectmt. Hence an action must be brought in a
county where a land lies. Coop. 161. 175. 188. 2 Bl. R. 1058.
1 Ro. 146. 1 Stra. 512. 2 Ld. R. 1532.

2nd Criminal prosecutions are local.

For offences vs. a laws of one state are strictly
local & can be punished only in that state.

Personal civil actions on penal statutes are not
local at C. L., as, between diff't. counties of a same
state; but criminal actions are. 2 Bl. R. 1058.

(See 10 Bargarant & Loeber x) 1 Stra. 512. Coop. 161. 175. 181. 1 H. Bl. 146.

(See 1 Burnwell & Alderson 179. 3 Burnwell & Brown 700 - Nicolson vs. Malt)

3rd - Where a subject out of which a cause of action
arises is local, a action itself is so. 2 East 580.

1 Stra. 1048. 2 Bl. R. 1058. Coop. 161. 175. 81.

2nd 4. Presumps "quare clausum fregit". It is not

for an injury done to y land & y^t. is local. 2 H. Bl. 125.
4 D. R. 503. Str. 646.

An action of "debt" or "covt. Broken" vs. y assignee of lease is local for y contract between y assignor & assignee is annexed to y realty.

The land is local with resp. of lease runs & y lease is incidental to y land. 2 East. 580. 179. Barth. 183.
1 Lando. 241. 53.

On y other hand an action of "debt" or "covt. vs. the original lessor is not local, this is not a personal contract. The lessor agrees to pay y lessee so much money.
1 Lando. 241. 5. 7 Co. 2. a. 6 Mod. 194.
2 East. 579. 80.

A plea to y jurisdiction is y first plea in y regular order of pleading. If an exception to y jurisdiction may be taken, & if not, another plea, not to y jurisdiction, waives y objection.

The reason is y^t. y Deft. by proceeding another subject to y jurisdiction tacitly waives y objection arising from y want of jurisdiction. Co. Lit. 127. v.
Hob. 164. 4 Bac. 28. 35. 7

Each Ct. has a right to decide upon its jurisdiction, & even a Ct. might be ousted of all jurisdiction.

A plea to y jurisdiction must be signed by the Deft. himself, not his atty for y Ct. supposes y^t. y atty. acts under y Ct. & by its permission. 6 Mod. 146. Lawes 191. Co. Lit. 127. a.
Hob. 164. 4 Bac. 35.

In Court. y Atty. may make a plea signed by himself. When y want of jurisdiction, however, arises from y subject matter y Deft. by not pleading to y jurisdiction does not waive y objection, & can't do it in any way, for y Deft. certainly can't give to the Ct. y^t. jurisdiction wh. it has not, & y proceedings

are absolutely void, & *coram non iudice*

As if an action relating to real property should be brought before B.R. in Eng. - & waiving & objection to jurisdiction of y. Ct. wd. not give y. Ct. any additional right to try y. suit.

The plea to jurisdiction must conclude to y. cognizance of y. Ct. The form is, "whether y. Ct. will have any further cognizance &c." Bac. Pl. &c. 1. 3 Bl. 503. 4 Mod. 145. 6 Lawes 109.

vide False Imprisonment. 1 Co. Lit. 363. Falk. 298. 4 Bac. 38

Disability of the Plaintiff. II. The second dilatory plea is to y. disability of y. plff. according to y. regular order of pleading.

It is a good plea y. plff. is under some legal disability to prosecute y. suit. Co. Lit. 1. 3. 8. 12.

These disabilities are various.

Outlawry. 1. Outlawry. This was never known in Court. An outlaw is as liable to be sued as any body. The deft. can't plead outlawry as an excuse, for then it wd. be an indemnity not a penalty. It is however a good plea to y. Disability of y. plff. Ray. 1. 1. Sid. 60. 3 Bac. 784. 2. 1 Co. Pl. 473. 1 Co. Lit. 6. 5 Co. 109. 722. 29. Lit. sec. 197. 1 Bac. 2. Abatement. 4. Bac. 35.

If y. disability of y. plff. exists at y. time when y. cause of action accrues, it destroys y. suit. Lawes. 1022

If not, it does not strictly abate y. suit. It is a temporary impediment. wh. continues only till it is reversed or removed.

The deft. must plead to y. same suit. 4 Bac. 35.

Lawes. 102. 3. 4. 12. Mod. 400.

But this disability extends only to such as were not in y. plffs. own right, & not to those wh. he brings in "after death" - e.g. as executors. 3 Bac. 782.

Co. Lit. 228. a.

But outlawry of a testator might be pleaded in bar
in an action brought by an Executor for y testator's
person whose right was to be enforced by y action.
1 Com. 6.

It is sometimes pleaded in bar & sometimes 28.
as a dilatory plea. 5 Co. 109. Co. Lit. 29. 128. B. 133.

If y cause of action is perfected by y out-
lawry it may be pleaded in bar. If not y plea
is dilatory. Lawes 38. 104.

2. Another plea to y disability of y plff. is excom-
munication. The only repl. is absolution. It is not excommu-
nication.
known in this country. Bac. excom. 2 Bac. 319.
4 Bac. 36. Co. Lit. 133.4. 8 Co. 63. 96.

3. A third plea to y disability of y plff. is ali-
enage. This is founded on a rule of natural
policy, as it is thought to militate vs. y safety of y state to allow aliens to own freeholds.
4 T. R. 208. 1 Bac. Abin. A.

By y C. L. all persons born in a foreign country
wherever their parents may be from, are aliens.
i.e. in a foreign sovereign state 3. Blk. 208. 72. 4 T. R. 308. 1 Bac. Abin. A.

By Stat. in y country y children of native
citizens tho. born abroad have y rights of nat.
viral citizens. Stat. U. S. Tit. 4. line 10. vol. 6. p. 9.
29.

(See New Eng. Encyclopedia article "Alien")
The two children of aliens not naturalized tho. born
out of y U. S. The children of aliens naturalized
have these rights if they are ^{under} 21 yrs. of age & re-
side in y U. S.

An alien not naturalized can't maintain an action of a real or mixed nature.

29. Alienage is ex. a good plea to disability of a p'ty. in a mixed or ~~mixed~~ ^{real} action. The reason is yt. an alien can't hold real estate. The genl. rule extends to all aliens whether friends or enemies. Exp. D. 434. Cowp. 171. 2 H. Bl. 162. Stra. 1382. 1372. Poph. 36. 2 Bl. 384. Exp. D. 499. 1 Bl. 371/2.

But alienage is not pleadable to an alien friend if action is personal, & in some new states aliens are permitted to hold real estate, & of course to maintain real actions, by Stat. This is to encourage emigration?

An alien friend may also hold a lease for mercantile purposes. R. 194. Poph. 36. Co. Lit. 25.
Dac. ab. Alien.

30. With alien enemies & laws are more strict they can maintain no action. It is therefore a good plea to disability of a p'ty. yt. he is an alien enemy. Stra. 1082. 1 Bl. et Rel. 163. 6 T. R. 23. 49. 4 Bl. ac. 26. (see New Edin. Encyclop. article "Alien.") Doug. 226 & 649.
But his person will be protected by law of nations. Doug. 526. or 649. Thayer 36. 7.

But a suit may be sustained upon a ransom bill given to an alien enemy, but not till war is closed, & then he must have recourse to Lt. of admiralty. This is an exception to the genl. rule, yt. no contract made with an alien enemy is good. 5 T. R. 23. Thayer. 326. 432. 3. 600.
Doug. 619. 25. 2 Brown. 1734. 1 Bl. R. 563.

It is an exception precisely on the principle yt. treaties truces capitulations &c. are exceptions. It is a part of the law of nations, & a suit can be held before prize Cts. Salk. 46. 5 T. R. 165. Stra. 1082. 1 Bl. R. 282.

And now by Stat. 36 Geo. 3. Ranson contracts by
by British subjects are prohibited. Marsh. 452. 3.

There is another exception to y^e genl. rule,
yt. an alien, residing here under a government-
al safe conduct, may bring a personal action.
It is a good plea in repl^y yt. he is under
safe conduct. Id. 282. Talk. 46. 1 Bac. 484.
8 T.R. 166. 1 Stra. 1082.

When an alien wishes to hold real estate
he can do it only by special act of y^e Legisla-
ture. There is usually no difficulty in obtain-
ing this. Cro. E. 142. 683.

It is yet undecided whether an alien en-
emy protected can maintain an action as Exor.
(Cro. E. 142. 683. 1 Bac. 84.

* An alien friend may as ex^{or} hold lands &
land or any real prop^y. 1 Bac. 84. (see below *) & of course
may sue for them. Cro. Bar. 508.

* According to my dict^y, & y^e late decisions of
national Law he can't, for an alien enemy has
no right to appear in y^e country, & shall he
be permitted to appear in y^e Cts. of Justice &
maintain intercourse with citizens? 1 Bac. 84.
Cro. E. 142. 683.

3. C. G. If an American having a
lease for 100 yrs. appoints an Eng^l. Exor. & Eng-
lishman may hold y^e lease as Exor. - Sup^r
it wd. be very injurious to his heirs. Cro. E. 5.
or 8. 1 Bac. 84.

If it is pleaded yt. y^e p^lff. is an alien ene-
my. y^e "Onus probandi" lies on y^e Def^t. 2 Stra. 1082.
(Bac. abt. 2 Chap 8c. 11.)

By C. L. perjury, perjury, attainder
for treason or felony, & yt. y^e p^lff. has become a

mask professed may be pleaded. Attainder is only known in this country. 3 Bl. 301. 4 ib. 280.

Attainder.

Attainder is a disability in Engd. & over respects g inheritance. 4 Bac. 26. 148.

The consequences of attainder are greatly qualified in this country by constitution of U. S.

It extends only during g life of g offender. It does not cut off g desc's room, or g chil-
dren's inheritance. Con. U. S. art. 3 sec. 3.

coverture. 4. Another disability is coverture. 6 T.R. 631.

31. If an action is brought by a married woman, her coverture is a good plea.

But when her husband is joined with her, her disability ceases. Bac. Pl. 7. 4. Co. Lit. 132.

Barth. 124. 1 Bl. 443. Lawes 108. 3 T.R. 631. 4 Bac. 29. 44.

Coverture in plff. is pleadable only as a dilatory plea, & if advantage is not taken of g disability in this way, g objection is waived, for whatever can be taken advantage of in pl. may never be taken at a subsequent stage of g suit. 6 T.R. 766.

It wd. be unreasonable to permit g defeat of suit in any subsequent proceedings by an objection wh. he might have made in limine.

6 T.R. 766. 3 T.R. 631. Barth. 124.

(None exceptions to g last clause of g paragraph. If a woman marries during prosecution her coverture is a disability to its continuance.

Her husb. may join with her & prosecute g suit in pl.
1 Bl. 316. 1 Talk. 2. 24. 23. 267. 4 Bac. 39.

Infancy. 5. Another plea to g disability of g plff. is that re, being g action is an infant; for an infant not

suing by guardian or prochein any court one at all.

The reason is y^t. he is incompetent to make a valid power of atty. or to conduct his own suits. 3 D.R. 201. Co. Lit. 135. b. Barth. 122.

3 Bac. 148.9 "Infancy & age"

Every person who appears by atty. is supposed to give y^t. atty. valid power. 3 D.R. 201, 1 Roll. 237.

If an inf^t. sh^d. bring an action with^t guardian or next friend, & sh^d. obtain judgment, y^t. sh^d. be erroneously judgment & awarded. 2 R. or 208 n. Barth. 283.

3 Bac. 150 n. Co. E. 4. 424. Cro. J. 441. 81. Bond. Pl. C. 1.

The error is an error of fact & not appearing on y^e record, y^e writ of error is a writ coram vobis.

By y^e Eng^l St. 21 Jac. 1. "When y^e inf^t. sue alone & recovers judgment, y^e judgment is good & can't be reversed. But if it is decided vs. him it is not good." Cro. J. 441.

By St. 4 Anne y^e. rule is extended, & if y^e inf^t. recovers by confession "nil nisi" or "non sum in forma", y^e judgment is not erroneous & awarded. 212. n. Bond. Pl. 2. C. 1. 2. Cro. J. 480. Ch. Pl. 435.

3 Bac. 149. 50. 3 D.R. 201. - a bond R. Hinman vs. Taylor.

But these Stat^s. don't include all cases.

6. Another plea to y^e disability of y^e p^{ty} is y^t. Pltff. not in esse. y^e p^{ty} or y^e person named as such is not in esse.

E. G. If y^e sh^d. institute an action in y^e name of some person dead, it sh^d. be a good plea to y^e disability. 3 D.R. 201. 1 Wils. 302. Laves 104. 1 B. & P. 44. Ch. Pl. 435. 6. For if y^e p^{ty} or def^t. dies, judgment is erroneous. Hony 44. Com. L. "abate" C. 16. 17. Bac. Abt. F.

It has been a question whether y^e. judgment is not pleadable in bar. I think it may be taken up as an exception in bar for there

can be no cause of action vs. a person not in
esse.

I have before ss. yt. judgt. if given for y. Pth. wd.
be erroneous, & it is a rule yt whatever wd. ren-
der y. judgt. erroneous may be pleaded in bar
at any stage of y. suit. Story 426. 103 & P. 25.

32. Pleas to y. disability conclude to y. person of y.
Pth. via 3 Bl. 308. Lawes. 1093. "if brought to be answered."

If however y. disability is temporary y.
conclusion is, "yt. y. ~~temporary~~ ^{disability} ~~will~~ may
with. say 8c." This however does not end y. action.

See Practice 585. Lawes 1039.

III. The third is last class of dilatory pleas, ^{or pleas} in
abatement. properly so called. 4 Bac. 35. Co. L. 134. b

The meaning of abatement is demolition
as to abate a nuisance on a writ.

There is I think a material distinction
between dilatory pleas & pleas in abatement.

Pleas in abatement extend generally to y. writ
only. The objects in y. decln. are to be reached
by diff. pleas & pleas to y. jurisdiction & to y. dis-
ability do not go to y. writ. Co. L. 134. Falk. 298.
Henth. 172. Lawes 331. 4. 3 Lev. 351. 4. 3 Bl. 301. 3.

It is ss. yt. no advantage whatever can be taken
of y. decln. by pleas in abatement. Falk. 212. 11th. 4.
Lawes 72. 3. 3 Lev. 223.

It is not however universally true yt a plea in
abatement can reach y. decln. tho' it is uni-
versally true yt. pleas attacking y. writ are
pleas in abatement.

If then there is a misnomer in the decln. there
is a good cause for a plea in abatement. 1 B. & P. 547. Misnomer
5 Mod. 132. 44. Lawes. 105.

Again, a variance between y writ & decln. is
pleadable in abatement. to y decln. 3 Bac. 624. Variance
3 Bl. 301. 34. 4 Bac. 530. Lawes 105. 1 Com. D. act. N. 12.

This plea can hardly now be made.

Again, a variance between y instrument declared
upon, & y description of y instrmt. itself, may be
pleaded in abatement. & usually is. But it
may be pleaded in bar, & thus exclude it on
y genl. issue, & this is y way in wh. y objec-
tion is most usually taken in y Eng. Ct.?

It is very clear then yt. a plea in abatement
may go to y decln. 5 B. & P. 547. 5 Mod. 132.

Lawes 108. Halk. 639. Com. act. N. 12.

Loc. Plac. 1. Com. Dig. Abatt. p. 1.

In all pleas in abatement, y greatest possible
certainty is required. The least inaccuracy is
fatal. They must be precise to y greatest de-
gree, as they are not favoured by y Ct. since they
do not go to y merits of y question, but tend to re-
fract y suit by taking advantage of a trivial mis-
take.

So also of pleas in estoppel. 10 Mod. 208. 8 T. R. 186.
3 T. R. 185. 6. 5 ib. 487. 87. Lawes 55. 56. 107. 134. Co. L. 82.
Com. Dig. Est. L. 11. 2 H. B. 530.

It is a rule yt every plea in abatement, must give a
better writ i.e. must be so pleaded as to enable y
J. to supply y defect & avoid y mistake in a
subsegt. writ. Yelo. 111. n. 1. Lawes 39. 103. 4.

Loc. R. D. 1178. Com. D. act. N. 12.

E.g. It is not
sufft. to take exception to y misnomer with the sta-
ting y true name, as in a plea of variance, y
vert must show y variance, & y way in wh. it was

produced, in short, & clear & manner of connecting it.
Doc. 5 Plac. 11.

The causes or grounds of abatement, are various.
They may be either extrinsic or intrinsic. Laws 102.6.
intrinsic, as on the face of the writ &c.

misdemeanor
addition. II. Misnomer or want of addition in writ, is a good
plea in abatement whether in writ or return.

34. Earth. 14. 3 East 167. Cro. E. 371. By misnomer is
here meant giving writ, a wrong name, 3 Bac. Pl. 68.
Laws 102.6. 1 Bulst. 7. 338. 302. E. G. It is a
good plea in abatement, if J. L. is called Thomas.

addition. III. The omission of writs "addition" is good ground of
abatement. The word "addition" means his title, true
description, place of abode &c. 3 Bl. 202. Earth. 14.
338. 103. Cro. E. 371.

To avoid mistakes & for purpose of identifying
person it is required by Stat. 1 Hen. 5 that
writs description be given in every writ.

By the term "addition" is not meant only title merely.
It includes his title & much more. But it
is not necessary to insert all the particulars, &
proper name & degree or profession, his trade &
present or late abode is sufficient.

The late laws of practice have in a
great measure excluded these pleas, for writs
must show a deficiency of procuring writ sh.
& Ct. will not grant for such purposes. They
will not give "oyer" to raise a defence so odious
to the law. 1 Linn. 318. n. 3 Laws 97. 1 Ch. Pl. 140
7 East 283. 3 Dors. 8 Bulst. 395.

This St. Hen. 5, requiring addition, extends only to
personal actions, disseins - criminals, & indictments.

In real actions, quod nulli constat de persona.

It is thought, yet in real actions, & description of & party with & person's name was a sufft. identification. 3 Bac. 618. Laves 97. 7 East 383. 1 Ct. Pl. 340. 3 B. & P. 325. 8 Mod. 85.

By C. L. neither want of addition nor misnomer was pleadable to an indictment for felony, & appearance of & prisoner in Ct. was supposed to identify him sufftly. 2 Hawk. 186. Cro. C. 114. 4 Bac. Pl. & J. 1. Hic. 45. But & Ct. then. 3. extended to those cases.

But this plea can be of no real advantage to & prisoner in criminal cases, for in making it, he must give his real name & of course & Ct. will detain him till another indictment.

1 Hawk. 243. 2 Hawk. 176. 238.

Want of addition is pleadable in a writ, by Ct., a fortiori, a mistake is pleadable. 3 Bk. 303. Comb. 65. L. R. 1014. 1 Com. 28.

A mistake in this case is as important as an omission, but this rule I conclude is now virtually abolished by rule of Ct. ut supra.

In real actions no addition is necessary except what is required by C. L. wh. required no addition. & party is ranked as high as a Knight.

Halk. 580. 3 Bac. 617. 2 Roll 469. Com. 189.

In Cont. & only necessary addition is & place of abode. When however one is sued in an official or representative capacity, & capacity or character in wh. he is sued must appear in the writ, for being sued in an official capacity in many cases, he is liable only in his official capacity. Garth. 302. 2 Fort. 83. 3 Bac. 620. 1. 4 do. 39.

Ex ors &c. must be sued as such, But if civil
35. a representative capacity of a person is not his de-
dication.

That is mentioned to identify, & capacity in wh.
he is sued, not his person.

But when such a civil or representative ca-
pacity is not necessary its insertion is mere sur-
plusage. Bro. & 333. 3 Bac. 521.

It is indeed entirely impertinent when
it capacity is not of inducement to action.

And when sued must be specified as such
not as an addition, but give such a descrip-
tion is necessary to show any cause of action.

Bac. 466. Bro. & 331, 2. 2 Vent. 84.

If two or more Defts. are sued together,
a misnomer of one of them is not pleadable
in abatement. by the other, nor can the other take
any advantage of it whatever. If however it cause
a variance the other may take advantage of it.

3 Bac. 38. 3 Bac. 620? So in indictments. 4 P.C. 177.

It has been a question whether if a writ ab-
ates as to one of the Defts. it abates as to all.

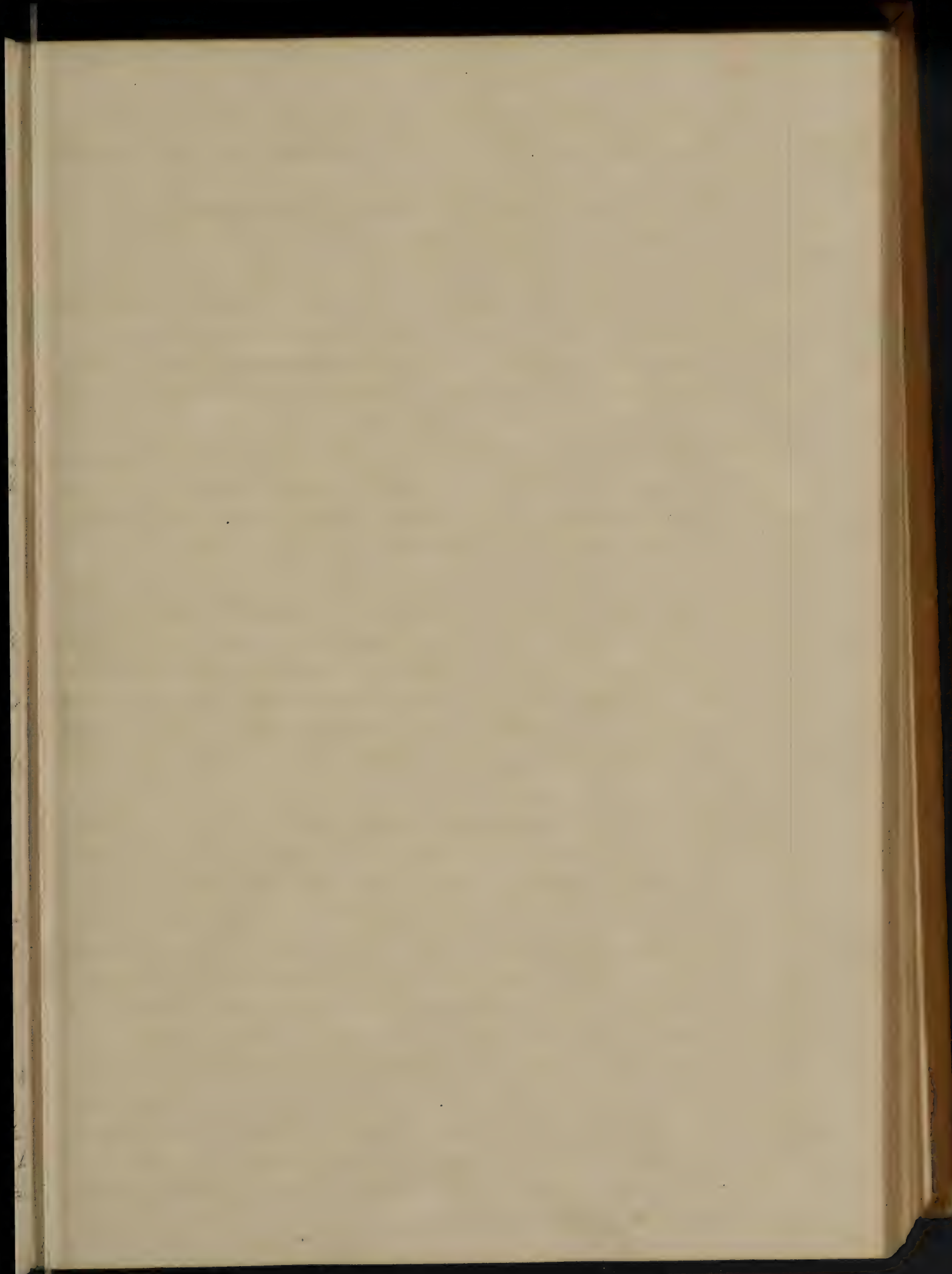
8 Co. 159. b. 3 Bac. 636. Barth. 96. 4 Bac. 48.

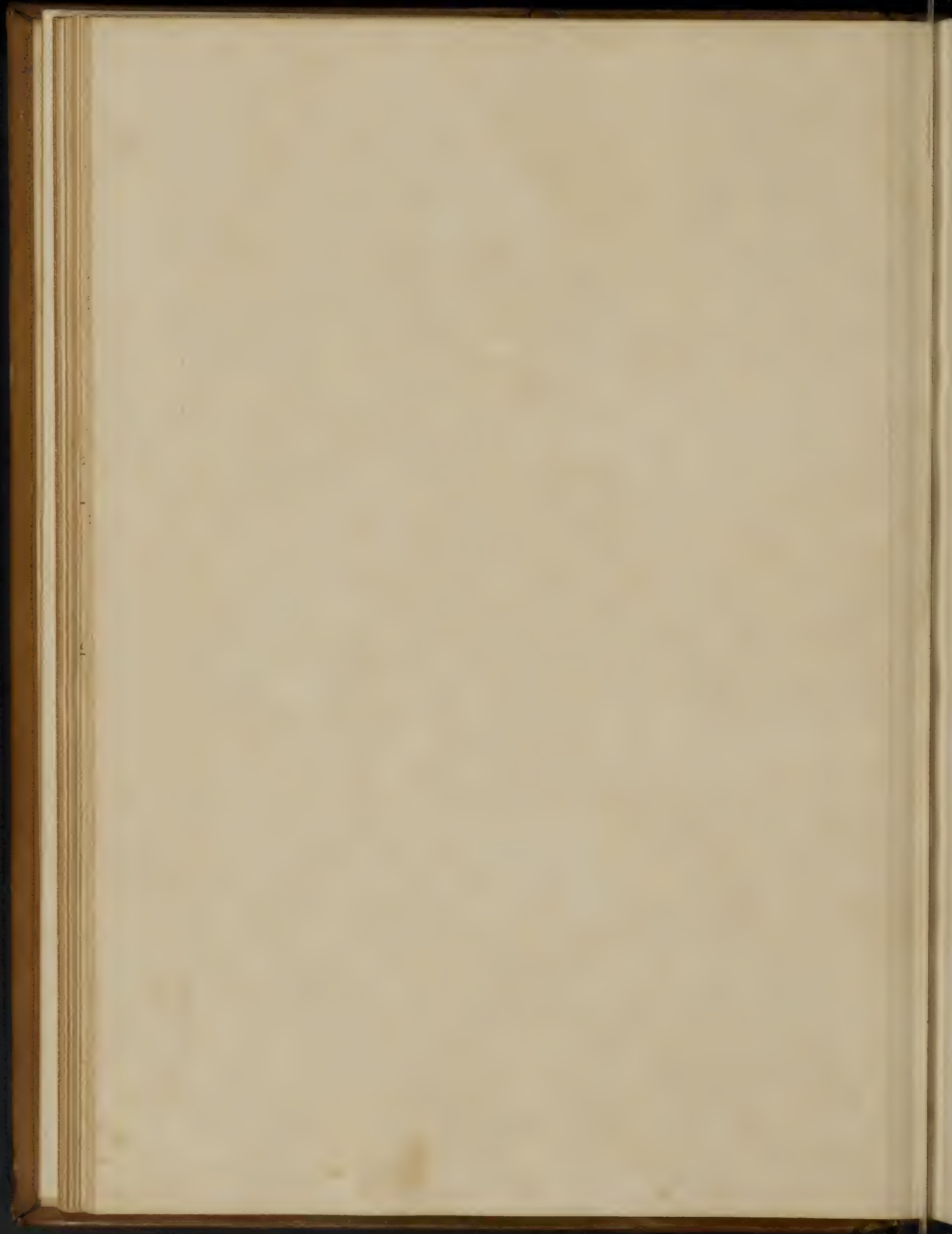
The question must depend upon the manner
of bringing the action. If there is an abatement
as to one, there is an abatement as to all,
for if they are sued jointly as one person the
law does not recognize them separately.

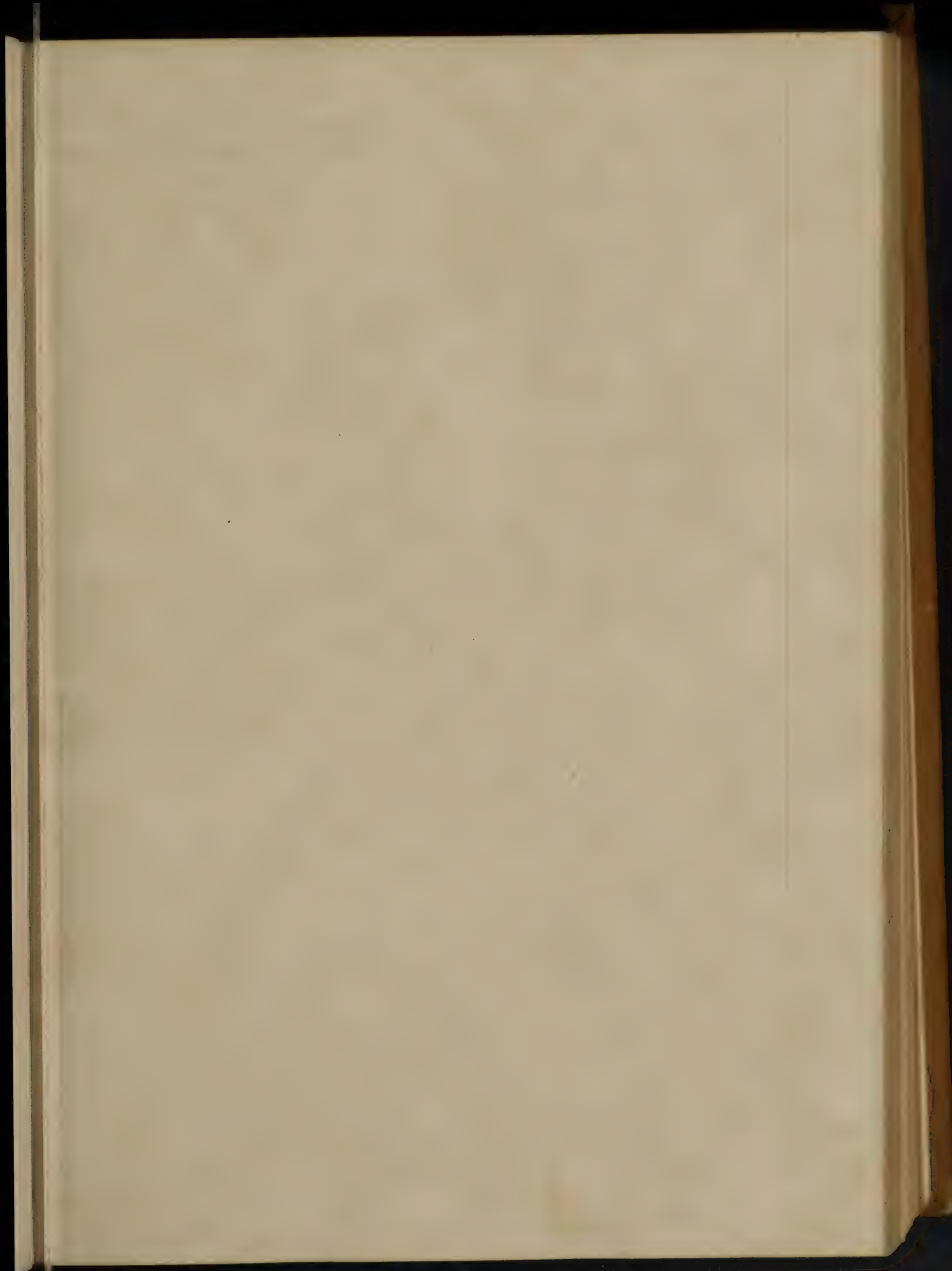
3 Bac. 517. 518. Barth. 96. 8 Co. 159. b. 1 Com. 77.

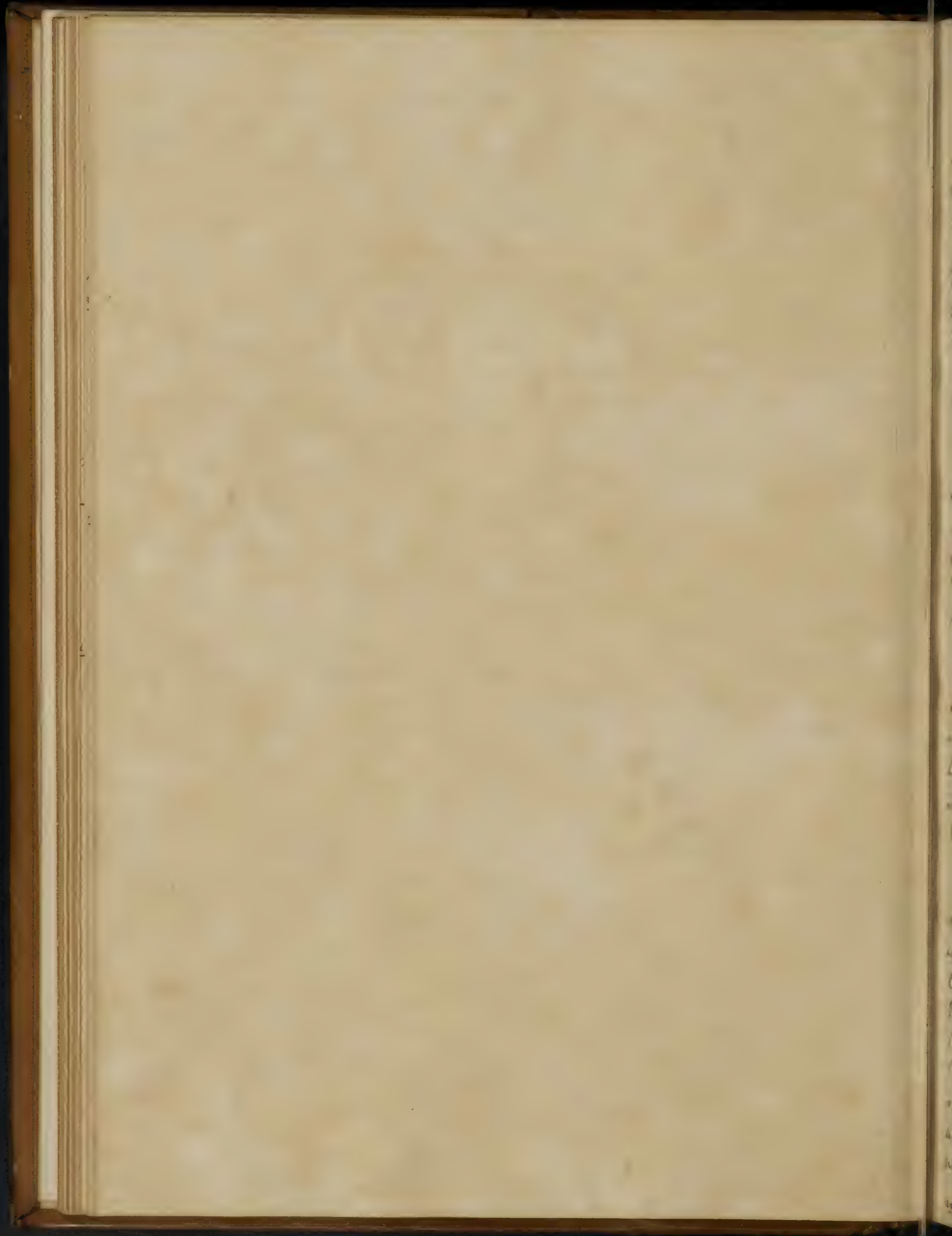
4 Bac. 55.

If several or joint & several, there is no objection
to the action continuing as to the rest when it ab-
ates as to one, for in this last case the Defts. are inde-
pendent of each other.









In a plea of misnomer the def. must not only say that the name averred is not his true name, but he must state that a certain other name was his at the issuing of the writ, by some authority that he was always known &c. - this J. G. thinks unnecessary; - and he must further deny, that he was called or known by the name averred on, when the writ issued. For the object of the rule is that the plff. may avoid future mistakes & that the judgment may not be delayed by captious exceptions. Salk 67. See Ray 118. 249. Wills 544. 4 Alton. 374. Com. Dig. Abatement 212. & 507. 518. 3 Bac. 624. 2 Chit. Pl. 418.

Lilly's Entries 6.

In pleading misnomer the def. must be careful in the beginning of the suit, not to admit that he is rightly named. - If for example he is sued as C. D. although his name is really A. B. he must not plead "and the def. C. D. comes & defends &c." 2 Saund. 209. 6. 1 Lilly En 1. 2 Ch. Pl. 417. 480. or 418. Carth. 124. 1 Salk. 2. 670. 208. 2 H. Bl. 207. 259.

Of misnomer as such, no advantage can be taken except by plea in abatement, and if the def. does not notice it as such, he waives his right; for it is a rule, that he cannot assign for error what he might have pleaded in abatement to the suit. ^{in law} Carth. 124. 1 Salk. 2. 2 Comb. 188. 625. 765. 2 H. Bl. 267. 99. 1 Bulst. 216.

It is said, that if a person executes a deed by a wrong sur-name, he must be sued in that name, and execution must be taken out in it; - when this is the case, the right name must come in under an "alias" 2 H. Bl. 267. 99. Stra. 1218, 1219. Co. Litt. 3. 3 Bac. 517. 29213. 1 Bulst. 216.

This however does not appear to me to be the correct method, - he should be sued by his right name, with an averment that he executed the deed by a wrong name, for a person designated by a wrong name is not in "esse." Bac. ab. Pl. 7. 3. 3 Bac. 519. 5 Co. 43. Cro. E. 897.

Cro. 558. 3 East III. In Court. if a def. executes a deed, after his father's death he can be sued as A. B. formerly A. B. Junior.

We are told in the old books, that when the def. executes a deed by a wrong Christian name, the mistake is fatal, but this, as expressed is not law.

If the action is brought on a parcel contract, & one has a wrong name given him, the mistake would indeed be fatal to the writ, but the plff. may then bring another.

Since the same rule holds as to actions for torts. Hil. 554. 7. Cro. E. 897. Cro. 558. Ch. pl. 440. Str. 1218. 3 Bac. 616. 12. 3 East III. Co. Lit. 2.

If the action is upon a specialty, he may be sued by the wrong name, for the plff. can allege that debt, it is well known by the wrong name as by his right name, & the debt is estopped from the denial by the production of the instrument.

There then can be no need of an alias or amendment, as there can be no variance quoad his name, for here two names are supposed. 1 Ch. 440.

When one executes a deed by a wrong Christian name, and is sued by his right name only, the writ is bad, for there is a variance. Hil. 554. 7. Cro. E. 897 n. Ch. pl. 440. Str. 1218. 3 Bac. 616.

When the action is brought vs two or more defts, the writ must designate the defts by all their proper names. Leach's C. L. 240.

If then a firm is to be sued, they must not be sued by the name of the firm as A. B. & Co. but must all be sued by their proper names, & company to be added, as "merchants trading in company" - for the term "company" is altogether too arbitrary. 8 D. R. 585. Leach's C. L. 240.

On the other hand, when a corporation is to be sued, it must be done by its corporate name only; - to sue the individual corporators would avail nothing, for they are not known to the law.

The corporation has only an ideal capacity. Leach 244
1. Pl. - corpora. - Str. 1218, 38. 4 Bac. 38. D

When a def. is sued by a wrong name, it is not necessary that he should take advantage of it, for his own security. He may waive his right to abate the writ, & provident judges goes vs him, the may plead it in bar to an action, but for the same cause vs him by his true name. Pl. & Bac. ab. Pl. f 3 - & he may move it by extrinsic ev. Str. 1218. 5 Bac. 625. 4 Ro. 38.

The practice in Conn. when a local corporation (as a town) is sued is to name the select men & three A. B. &c. select men of the town of A. & the rest of the inhab. clerk of saide town - instead of "the town of A." as it shd. be. 2 L. 1

A misnomer of the Plff. may also be pleaded in abatement, & the rules of pleading are analogous to the misnomer of the def.

Should the def. plead the misnomer of the Plff. - a replication, the Plff. was known & called as well by the name in which he is sued, is good. 1 East 544

But a wrong addition given to the Plff. is no ground of abatement; any further than it was at Com. Law.

The 2d Hen 5. does not extend to Plffs. It is presumed that the Plff. is known by the fact of his suing out the writ.

The rule at Com. Law was, that no addition was necessary under the degree of Knight. 6 Mod. 85. Comb. 139. 1561. 2 Roll. 469. 3 Bac. 619. 17. 18.

In this state a wrong description of the plff. place of abode, is pleadable in abatement, for the abode of parties, often affects the jurisdiction of the Cts.

Fem. Covert.

III. A third cause of abatement is, that, that the def. being sued alone, is a feme covert. Coverture in a feme sole, is a good cause of abatement. Co. Litt. 132.
1 H. 4. 140. 4 Bac. 39.

But if a feme sole, sue as def. marries, spending the suit, - this subsequent marriage of her, cannot defeat a suit rightly commenced - otherwise she might by her town act, defeat a suit, regularly commenced vs her. Bac. ab. pl. 74. Esp. 2. 328. Co. Litt. 132.
1 Ch. pl. 137. 70. Carth. 124. Str. 81. or 811. See. May 525.
Co. J. 313. 1 Bac. 9. 10. "abatement."

39.

If a feme covert would avail herself of her coverture as a defence, she must plead it in abatement, and not to the action, - she must sign her own plea in abatement, for in this case she cannot make or appoint an attorney.

If she craves a general joinder in impairance, she "ipso facto" waives all right to abate.

When a female is sued upon a contract entered into by her alone during coverture, she may give her coverture in evidence under the general issue - for it is not to defeat the present suit, for misjoinder of the husband, but to show the contract to be utterly void. Latch. 24. 4 Bac. 29. 39. 1 Ch. Pl. 157. 170. 1 T. R. 627. Com. Dig. Abatement. F. 2.
Carth. 124.

If the wife should neglect to plead her coverture, the husband may appear and plead it in bar, at any stage of the proceedings, - or if in consequence of her neglect, the plff. should obtain a judgment, vs her, it may be reversed by a writ of "Coram vobis," in favour of both husband and wife. For though the wife

by her neglect, may forfeit her right to plead alone,
she cannot thus impair the marital rights of the
husband. In this case the writ must be brought in
the names of both husband & wife, otherwise the writ
is erroneous. 3 T.R. 631. 5 do. 681. Salk. 400. Bac. ab. 4th. 172
3 Esp. 22. 16. 19. Lilly. com. 1. 2 Chit. 2d. 415. 425. 2 Glau. 209.

4 Bac. 9. 10. 39.

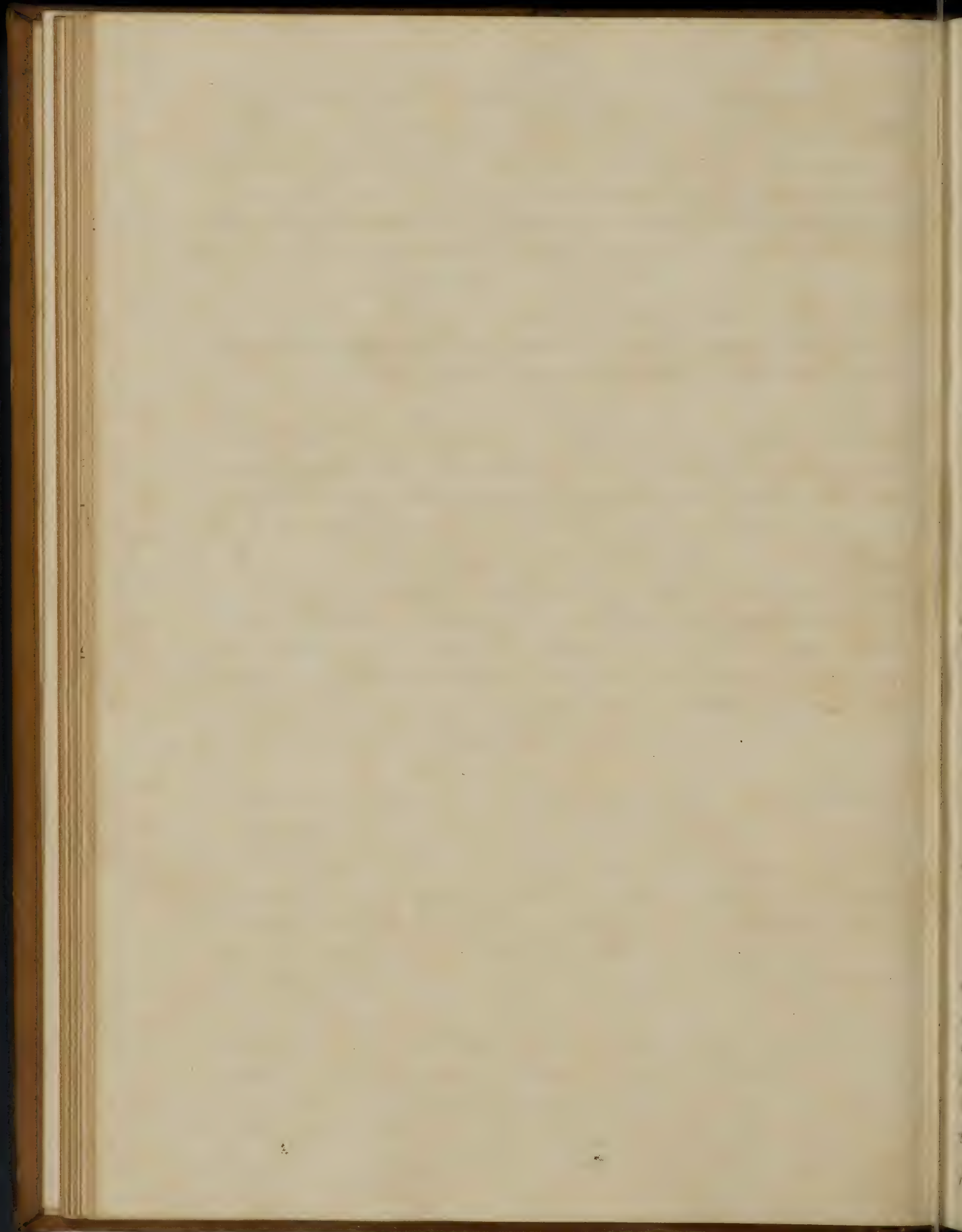
If a feme covert pleads her coverture, she must plead
it herself, & sign the plea herself. 2 Saund. 209. Salk. 400.
2 Ch. 4th. 425. 3 Esp. 22. 16. 19. Hawes 105, 108.

Again, it is a good plea in abatement, that 2 persons
suing as husband & wife, are not in fact husband
& wife. And "i consensu" if 2 persons, are sued as husband
& wife, who are in fact not so, it may be pleaded in
abatement. This however is not always the case, for
in many instances a husband "de facto" may sue
(but on what principle can they join as 4th & 5th) or be
sued with his reputed wife, the same as if married.
Comb. 471. 2. 131. Bac. ab. "Hus & feme" a. Co. Litt. 87. 105.
5 Co. 53. 6. 3 Blk. 427. 35. (*no soundness in the rule 9. 9.
thinks on principle) (Lives 105 la. down with qualification! 17.)

But it is not a good plea in abatement that the
def. is an infant, - sued without guardian. For an
infant is liable to be sued alone; the Ct. will however
allow a reasonable time for the guardian to appear
and defence, if he has one; if not the Ct. will appoint
one "ad litem." Co. Litt. 87. 125. 3 Blk. 427. 5 Co. 53. 6.
Case of a lunatic is the same as that of an infant.

When an infant is sued without a guardian,
it is the 4th's concern & not the infant's. It is more
important to him, for if judgment goes vs him, (the infant)
he may obtain a writ of error & reverse it. Cro. J. 640.

Hutt. 42. 2 Yelv. 56. 8. 10 Co. 134. 2 Bac. infancy & title "error" 218. 4 Bac.



IV. Another cause of abatement is the death of one of the parties "pendente lite." - at C. L., if a sole plff. or deft. dies, the suit abates of course. 10 Co. 134. Cro. & G. 932. 4 Bac. 411. 1 Com 55, 6. 1 Bac. 7. abt.

Death of
the
Parties.

If on the death of one of the parties "pendente lite" final judgment should be rendered, it would be erroneous, & might be reversed by a writ "coram vobis."

The error would be extrinsic; for the Ct. to have pronounced judgment, must be supposed to have been ignorant of the death.

Since the writ of error in personal actions, must be brought by or vs the executor &c of the deceased party, - as the case may be, - by or vs. the heir in real actions, May 29, 1839. 4 Co. Litt. 139. Carth. 338, 9. 10 Co. 134. 12 Bac. 7. 2 Ro. 218.

If a writ of error should be brought, averring that one of the parties was dead, when he was not, it is the duty of the Sheriff to bring in the fact, and the person of the plff. may appear as def. in the writ of error, as by his own executor. He may plead "in multa est erratum". At C. L. the rule is the same whether there be one or several plffs. Carth. 339.

If one of several plffs. die, the suit will abate, unless there has been a summons and severance. The reason is, that the writ asserts a joint right, which by the death of one of the parties is destroyed.

The only exception to this rule, rises in case of personal actions, after a summons & severance. - Examp. A & B. have a joint right to sue, and A. sues alone in the name of both; now if B. does not appear at the trial, A. may have a summons for him, and if B. does not appear in answer to the summons, the Ct. will award a judgment and severance; after which judgment - if B. dies, the suit will not abate, for B. is

no longer a party to the suit. 6 Co. 26. 10 Co. 134. 1 Bac. 8.
(Doe. v. Plac. introduction. 24.

But if one of several depts. die "pendente lite", the rule at C.L. is, generally, that the suit will not abate -

On such the rule at C.L. is, that the plff. make a suggestion on record, of the death of one of the depts., & proceed vs. the other. 1 Bac. 8. 1 Shaw. 156. 3 Nov. 249.

The reason why the suit does not abate, is, that they do not assert joint claims; the fact that two or more depts. are sued together, does not imply a joint concern in it; they need not defend jointly, one may be ultimately liable & the other not. - The jointure may have been altogether accidental.

41. If however the cause of action would survive vs. the surviving debtor, the action I conceive, must abate.

By the Stat. Cap. 2 (17th) & 8. & 9. 16th 3rd & similar ones in this country, the inconvenience attending abate^{ment} in the case of the death of one of the parties, is greatly remedied. - as 1st when one of the several plffs. dies "pendente lite", the suit does not abate, provided the cause of action survives in the persons of the surviving plffs. This will happen very generally when the action is rightly commenced. 2 M. & A. 115. 4 Bac. 42.

On the other hand when one of several depts. dies "pendente lite" the action does not abate, provided it survives vs. the surviving.

2. If a sole plff. die "pendente lite", the suit will not abate, provided the cause of action is such, as would survive to his representative. On the other hand, if a sole dept. dies "pendente lite" the action will not abate. 4 Bac. 42.

In Eng^d the death must have happened after
some interlocutory judgment, in order to give effect to the
rule. By this interlocutory judgment is meant, the
judgment of the writ of certiorari of damages, to be awarded.
4 T.R. 431. The terms interlocutory - same rule holds,
as to a sole def. 2 All. 115. Bac. ab. 1st. p. 3. 6 mod. 144.
Toll. ex. 442, 3. Lilly's En. 647. Generally any judgment
not final is called "interlocutory".

The 2^d of Conn. on this subject has no reference to
interlocutory judgment. To render the representative able
to sue, the cause of action must survive, in which
case, death produces no abatement.

But if either of the parties die after verdict, but
before judgment, the action will not abate, judgment will
be rendered. 2alk 42. Lilly's En. 647. Toll. 442, 3.

This is virtually a judgment "non pro tunc". It is
the same as if rendered at the moment of the ver-
dict. Toll. 442. 3 Salk 42. 1 Sid. 335.

The method of proceeding is this, - when one of sev-
eral plaintiffs dies, his death is barely suggested on
the record, & the surviving plaintiffs proceed as if the
right of action was originally vested in them alone.

So when a sole plaintiff dies, if the cause of action survives, 42.
his execution by entering his name as executor on the
record, & suggesting the death of his testator, may
continue the suit.

But when a sole def. dies, the plaintiff must take out
a "scire facias" vs his Exor. &c to appear & show cause,
if he has any, why the suit should not be continued,
and judgment awarded vs him as Exor^{ty} of the deceased.

If there be two plffs A & B. - now if A die "pendente lite" the action survives to B as we have seen (ante), but further, if B should die before the suit is closed, his (B's) Exec^r may enter & prosecute the suit to judgment. The entire effect of dying, on A's death, survives to B, & he transmits it to his representatives.

So if there be 2 def. & both die before judgment, the plff. must proceed vs the Exec^r of the last ~~surviving~~ surviving def. 1 Brac. ab. 7. Ex 982 - 1 Inst 739.

Real actions, however, still generally abate, according to the rules of the Com. Law, as the st. are confined to personal actions.

Yet real actions are within the st. when one of ~~two of the def. dies~~ the plff. or def. dies. In such case the suit shall not abate. But in case of a sole plff. or def. in real actions, the suit will most generally abate at C.L. & the st. does not extend to such actions - 16. 1 Day 186.

variance.

43.

V. Another good ground of abatement, is, what is called a variance.

When there is a variance between the writ & declaration, it may be pleaded in abatement, for as the writ is the foundation which authorizes all future proceedings, if they do not agree with it, they are bad. 4 Brac. 843, 4.

Thus if the writ sounds in "tort" & the declaration in "contract" or vice versa &c &c. 1 H. Bl. 249. Yelv. 5. 2 N. B. 82. 5 N. 712 Lewis 97.

(The Co. will not allow the def. or ver. of the writ, to show the variance. No such rule in Conn. the writ is always in Co.)

A modern rule of practice in the Co^t of Westminster seems to have impaired this rule. 1 Ch. 440. Hob. 279. 1 Saun. 318. 2 Wils. 232, 294. 7 East 383. 6 Co. 14. 4 Mod. 246. 6 D.R. 303.

There is a mode of setting aside proceedings in this case, by motion for irregularity, as in the case of a writ in bailable process & declaration is only one. 44.

The Co^t will not grant over of a writ, to enable the def. to place a variance, if J. G. thinks where the variance is not material. at all.

If there is a variance between the instrument declared upon, & the description of it in the declaration, it may be pleaded in abatement. Salt. 659. Com. D. abt. n. 12. 2. 1 B. & W. 827. 6 Co. 14. 2 Wils. 232. 4 D.R. 314-16. "Doc. 240."

Advantage may be taken of such a variance, several different ways. The most usual mode in Westm^r Hall is by objecting to its admissibility in evidence, or after its admission, by objecting that it does not support the declaration, & thus works a "non-suit." 17 A. 656. 4 do 612. 1 Saun. 154. Dougl. 208. 640. 1 B. & W. 7. 4 D.R. 612. 687. 8. In Eng^l it usually works a non-suit. 3 Wils. 766. 7.

In Conn. advantage is usually taken of it by plea in abatement. —

There are four different modes by which advantage may be taken of a variance. 1. By abatement. 2. By objecting to its admission in evidence, which will work a non-suit. 3. By objecting under the general issue that it does not support the declaration. 4. By ^{pleading over} ~~repleading~~ it verbatim upon the record, & then demurring to the declaration. 1 Saun. 307. Com. D. 4 pl. 93. 3 Wils. 339. 4 D.R. 612. Bull. 213. 2. 1146. Hob. 18. Dougl. 208. 213. 45.

There is no objection to the declaration on the face of it. -
 How then can the def. demur. The instrument when
 cited on the record, is thus made part of the declaration
 itself. It is the same as if the plff. had himself recited it.
 In practical language, the plff. has asserted that a
 certain instrument is not what it really is, the def. then
 says "you have stated a certain instrument to be this,
 which the record contradicts. Kirk. R. 106. y. Not Law.

No advantage can be taken of a misnomer as such,
 except by plea in abatement; but when it occasions
 a variance, advantage may be taken of it, in either
 of the 4 modes last mentioned. But in so doing,
 it is not regarded as misnomer, but as a variance.
4 Y. R. 612.

Thus if J. S. is sued as T. S. upon a bond, he may ad-
 mit his name to be T. S. then say that the bond execu-
 ted by J. S. is not the one declared upon.

non mis-
joinder.

VI. Another ground of abatement is the nonjoinder or
misjoinder of parties.

joinder of
parties.

If one person sues alone, when another person ought
 to have been joined, this nonjoinder is always
 pleadable in abatement. Co. Litt. 164. a. 189. a. 195. b.
148. a. Salk. 4. 7 Y. R. 243. 1 Saund. 291. R.

In the case suppose the plff. has no right of action
 as sole plff. - The right should be joint & only exercised
 jointly.

46.

On the other hand, when several persons bring an ac-
 tion jointly, when the right of action is vested in one
 only, this misjoinder is pleadable in abatement.
Cap. E. 143. 1 Leon. 315. Hob. 72. 1 Com. 13. 1 Roll. 294.

This rule is universal, such a misjoinder may in

every possible case be pleaded in abatement.

But there are also some cases when advantage may be taken of it, under the general issue. - In others, only in abatement; and in others still, advantage may be taken of it by way of demurrer.

When an objection arises from the non-joinder or misjoinder of parties to a suit, if the objection involves a denial of the declaration, or any material allegation in it, advantage may be taken of it in any of the aforementioned 4 methods; for what ever goes in denial of the Plff's allegations, is in support of general issue. 2 Str. 820. 1 B. & P. 75. Peck 203. Bull. n. p. 172. 2. 4 R. 282. The principle is that of variance.

Thus if in an action on a contract, one sues alone, when the right of action is in several, the def. may take advantage of the error, under the general issue, or by oyer and demurrer, or he may plead it in abatement.

When the fact of the action being brought by one, goes in denial of the declaration. - The declaration alleges that the def. promised the Plff. so much, the def. may say under the general issue, that he did not promise the Plff. - but the Plff. & another person. 1 B. & P. 75. 176. 2 Str. 820. Peck's. 20. 205. 2. 4 R. 282. Bull 152. 1 Saund. 291. 4. 89. 1 B. & P. 76. or 77.

In these examples, it is supposed that the contract was in writing, for oyer could not be had of a parol agreement. 1 Saund. 152. 3. 291. 4. 89. 1 B. & P. 67. 8 Tra. 1145.

If in an action on contract, one sues alone, when the right is in two, or vice versa, and this appears in the declaration, the mistake is fatal & will not be aided, even by a verdict. When the fact appears on the declaration, it never can be cured. 5 Co. 86. 1 B. & P. 67. 1 Saund. 151. 8 Tra. 1145.

On the other hand, if one brings an action, sounding in "tort," when the right of action is in 2 or more, and it even appears on the face of the declaration, it cannot ^{only} be pleaded in abatement. Suppose J. S. has committed a trespass on the joint property of A. & B., and A. sues alone, J. S. for the trespass. Now this nonjoinder can only be pleaded in abatement. 1 Saund. 291, 292, 293.

The declaration alleges that J. S. trespassed upon the land of A. The fact that it was also ~~on~~ the land of B. does not deny the declaration, therefore does not strengthen the general issue. 54 R. 466. 1 Saund. 291. Salk 232, 290. 96. Str. 326. 1146. 54 R. 649. 5 East 417. 22 R. 205.

Thus if A. & B. being joint tenants. - A. alone sues C. for trespass. - The declaration alleges that C. trespassed on the land of A. - the fact that it was also the land of B. does not deny the declaration, & therefore will not strengthen the gen. issue.

When the objection arises from non or misjoinder does not go in denial of the declaration, an advantage can be taken of the mistake only in abatement. 5 East 417. Peak. 205.

In the case mentioned above, however, B. may show under the general issue, the interest of B. in order to divide the damages, not to defeat the action.

47. On the other hand if 2 persons sue alone together in an action sounding in "tort," when the right is in one only, advantage may be taken of it either under the general issue, or in abatement. When the objection goes in denial of the declaration. - as if A. & B. sue C. for trespass, when C. trespassed on A. only. Cro. E. 143. 5 Bae. 211.

(Cro. R. Lucy vs. Barnes, 1805)

If one joint owner sue alone for a "tort," & the def. does not plead the nonjoinder of the other in abatement, the other joint owner may afterwards bring an action

for his share of the damages. - For the def. by not pleading the nonjoinder, has virtually admitted their right to sue alone. 4 T.R. 279, 1 Esp. 2d. 586, 622 -

But when one partner who has withdrawn his name from the firm, receives part of the profits, there is no necessity for him to join in the action, tho' he is liable for company debts. Rep. R. 408.

If one of two parties is sued alone on a contract, the nonjoinder of the other must be pleaded in abatement, unless it appears on the declaration or other pleadings that there is another joinder. 2 Bl. R. 947, 5 T.R. 651
1 Sam. 291, 6th 6049. 2 N.R. 365. 1 H. Bl. R. 236, 5 Burr 2611.
2 Talk. 440 contra. not law. 5 D.R. 327, 369.

Suppose that A. & B. are joint trespassers on a contract, and that A. is sued alone. If he wishes to take advantage of the nonjoinder, he must plead it in abatement.

The reason is, that the fact, that another person was joined with him in contracting, does not prove, that he does not contract. - It does not deny the declaration, & consequently does not strengthen the general issue.

In an action, "ex quasi contractu" the nonjoinder of another as def., if pleadable at all, is only pleadable in abatement. 48.

According to modern opinion, it is not pleadable at all. 1 Sam. 291, 6th 4th R. 369. Carth. 62, 3, 3 N.R. 365.
(Contra, Talk. 440 - Not Law.)

Actions "ex quasi contractu" are those compounded of "tort" & "contract" i.e. contract the inducement, and "tort" the gist.

Suppose an action is brought vs. a common carrier, whereby the plff. has lost his goods. 3 East 67, 62, 71, 5 T.R. 649, 51. 5 Mac. 26, 71, 192.
Sam. 291.

"this was formerly considered as 'tort,' founded on breach of contract, but it is now considered as sounding solely in 'tort' (and they need not be joined but are *several*).

It appears then on action, if one of 2 parties is sued alone, he may plead it in abatement, but not under the general issue.

49. If, in an action on a contract, the suit is abated, & disposed, since another action is brought by the defendant disclosure in the former, he may plead that there is still another to tell the whole is disclosed. 3 East 711. 5 Co 119. 1 W. 40 72. Examp. If A. B. C. & D. are sued alone when jointly interested. A. may then plead that B. is not joined; If then A. & B. are sued together, they may plead that C. is not joined &c. 1 Burr. 28

But he, who has in a suit pleaded that another ought to be joined, when such deft. is joined, he who first pleaded, cannot be admitted to plead in abatement the 2^d time.

But if it appears by the pleading of the 1st deft., that another ought to be joined, the deft. may plead in abatement or take advantage of it under the general issue. 5 Burr. 2614. 84 R. 769. 10 Asp. 291. 6 R. 180. 180. 34. 96. 52. 6.

If the misjoinder appears on the declaration, & that the person was "in case", the omission is incurable, & cannot be aided even by verdict. It.

On the other hand if one brings an action founded in "tort", when the right of action is in two or more, & it appears on the declaration, it can only be pleaded in abatement. In this case "a portion" the declaration would be demurrable.

If 2 persons are sued on a contract made by one only, advantage of this may be taken under the general issue, 1 East,

For the objection arising from the misjoinder, denies the declaration, & of course supports the general issue.
Examp. A. & B. being sued on a contract, where A. alone promises. 1 East 48. 2 W.R. 454. 2 Day 272. Shep. & Baller (there is a variance). This fact is in denial of the declaration, then would be no need of pleading in abatement, if it were admissible. I doubt however if it would be admissible 3 East 152. Carth. 361.

If an action is brought on contract vs two persons, when the contract was really made by one only, the plff cannot obtain judgment vs either. Carth. 361. 3 East 62. 1 Kelt. 284. 5 Esp. 47. The verdict of the jury will state the fact that one made it, but that both did not. And in this case it is impossible for the plff. to avoid the objection by entering a not pros. vs the other. For if he enters a not pros. vs one, when the action was brought vs two, he disproves himself. This would change an action vs 2 into an action vs one.

On the other hand, if 2 persons are sued for a "tort" which was committed by one of them only, the misjoinder cannot be pleaded in abatement. Stra. 509. 993. Esp. 336. 8 Co. 157. Stra. 420. - for in an action of "qu. cl. fr." brought vs A. & B. when committed by A. only. A. may be convicted & B. acquitted. In "torts" there are no non or misjoinder. Contracts are joint only. Com. m. f. 3 East 62.

In cases of "torts" committed by several, one may be sued alone, or any, or all together. 3 Bl. 112.

There is however one exception to this general rule. It is in cases of tort arising out of real property, & from their joint interest. & this is the only exception. 1 Ch. Pl. 75. 6. 5 T.R. 651. 1 Lawes or Sayer. 291. C. 2 East 574. 2 Bl. 18

Suppose A. & B. joint tenants, are bound for their joint tenancy, to keep up a certain water course, but by their negligence, it overflows the land of another C, if bringing an action of tort must bring it vs both. J. & C. does not see why joint tenure should vary the rule.

When the non or misjoinder goes to the denial of the declaration, it may be pleaded either by abatement, or under general issue.

4th Cause of abatement, is the pendency of another
suit, for the same cause & between the same parties
1 Bac 13. 19. 5 Co. 61. a. b. 4 Co 43. a - this is to prevent
vexatious suits. 4 Bac. 48.

If there is a single cause of action between the same parties; one suit is sufficient for the purpose of justice. "the law abhors a multiplicity of suits". This rule does not hold however, unless both suits are of the same kind, or at least, concurrent, & the causes of action the same.

They must both be by the forms of law, adapted to the cause of action 5 Co. 61. a. b. Hob. 184. 4 Co. 43. 1 Com. 149.

In acting for trespass, for taking goods, the pendency of a former one in trover, for their conversion, will abate it, for they are concurrent. Hob. 184.

But tho' all the actions originate in one & the same transaction, yet if the cause of action is not specifically the same in both, the pendency of both suits, is not cause of abatement.

(The suit is ~~not~~ considered as pending from the time of the writ's issuing. 1 Bac. 41. 2 Hawk, 275. folio, Cro. E. 6, Cro. J. III. 5 Co 48. 2 Bur. 1423. 1 Root 486. Sal. 39. 7 Co 30. a. Corp 452. 3 Bl. 273)

It is not indispensable to the abatement of the suit, that the 1st suit be pending at the time of the abatement. 50.
(Doe. v. Roe. 10. 4 Bac. 48. / Examp. A. has an action commenced yesterday vs B. & today commences another for the same cause, and to improve with draws the first suit; the second is vexatious ab initio. If however it appears at the time of commencing the 2^d suit, that the first must be wholly ineffective, in consequence of any mistake, the 2^d tho' brought for the same cause will not abate. 1 Root. 365. 562. 4.

Examp. In an action where trover only will lie, the 1st being an action of trespass — Then, a second action brought, pending the first, is not abated. Cro. 52.

No determination in the Sup^a Cot of Comm. 1 Root. 365. 562.
The 1st is considered as pending from the time of the writ's issuing. 1 Bac. 41. Cro. 6/677. Cro. 7. 111. 5 Co. 48.
3 Bl. 273.

The pendency of a prior action will not abate a subsequent one, unless it is vexatious, — And it is always so, when all that can be recovered by the 2^d, can also be recovered by the 1st.

Again, the 1st will not avail, even tho' there be a new def. added in the 2^d suit. The rule appears to be, that the 2^d action will ~~not~~ abate for both defs. 51.

I think however that the 2^d should abate ^{only} for the def. common to both. The weight of authority is, that it will abate "in toto." 1 Root. 155. Bac. 41. 11. Hob. 137. Carth. 96. 7. 1 Shoro. 71. (contra 1 Root. 155) 1 Bac. 13. 14.
(Lutwidge 42)

On the other hand, if one of the defs. mentioned in the 1st is omitted in the 2^d, this is clearly vexatious, & the 2^d action will abate in toto. 11. Carth. 96. 7. 1 Bac. 13. 14. Hob. 137. 4 Bac. 49.

But if it should appear, that the first may be defeated for non or misjoinder, would the 2^d abate?

There is a class of cases, to which neither of these last mentioned rules will apply. I refer to action on contract, where there is a non prosequi or misjoinder in the first.

Q If a 2^d suit is commenced on the same day, that the 1st is abated, the 2^d will be supposed to commence after the abatement of the 1st. In law there is no fraction of a day. Allen 34. 4 Bac 49. Gibb. ex. 260. Bac. ab. 11. Du. Cas. this presumption be rebutted? Gibb. Com. Pleas 260. 1 Bac. 14. (#)

Q It is no cause of abatement that another action is pending for the same cause in plff's favour vs a stranger. 11 Mod 420. 1 Com 50. Hob 137. 8. The def in one suit has nothing to do with the other, - There is no vexation here, - The rule is the same where there are joint & several debtors. The action may be brought vs them all. - Wills of Exchange - all parties may be sued at the same time. 11 Mod 428. Hob 127. 8.

But in criminal cases,

Q It is no ground to abate an indictment, that a prior indictment is pending for the same offence; - for the Ct have the power to quash, within themselves, either of them, and according to discretion will regularly do it. Secy. of Informations & Appeals. 3 Hawks 190. 273. 367. 1 Mac 13. 4 Sel. 48.

32. Q If two informations should be offered at the same day, by different persons, ^{formerly held} each will abate the other, & no final judgment can be rendered on either. - I doubt the principle of this rule. 1 Com title - abate. Hob 128. Moore 864. 85. 2 Burr 1434. contra (# a day is according to mathematicians a punctum temporis)

In my view there is nothing to hinder a collision between the informer & the friend of the prisoner, which should destroy the effect of the information; & this might be expected & carried "ad infinitum". This is however the rule laid down but it appears to J. G. very dangerous. - It would tend to

8th Cause of abatement is, that the writ was unduly issued. — It also is every informality in the writ. If there are defects in a writ which will render it absolutely void. Com. D. abet. H. 1. Lawes 106. P

If the writ is made returnable to any other term, than the next succeeding term of the C^t, that writ is void (& those who act under it, act at their peril) — provided there is sufficient time for service & legal proceedings.

1 Root 315, 16. 2 Salk. 400. 3 Wils. 348. (*where there is sufficient time intervening.)

The reason is, that otherwise, the def. might evidently be imprisoned, or held to bail, for any indefinite period. 1 Root 315, 16, — for he could take no advantage of it till the return. Nor would any one give bail.

If the writ is issued by incompetent authority, it is utterly void. — for a writ issued by a person without competent authority, in law, is nothing more than blank paper. 2 Inst 83. 1 Lev. 2. Cro. E. 592. 4 Br. 43, 8. 1 Com. 46. Sid. 502.

There are also errors which under the writ, are defective but not void — i.e. abatable.

If a writ has been defectively returned, it may be pleaded in abet. A defect in return, is the want of sufficient time between ~~the~~ the date of the writ, & the return day.

(Either of want of date or an impossible date is good cause of abatement. — i.e.)

In C^t 15 days is allowed between the date of the writ & the return day — If then, the Sheriff has returned it, in 14 days after the date — the writ is defective. Cro. E. 50. 2 Kebbl. 461.

Such defects may be pleaded in abatement, but if not taken advantage of in abatement, the error is waived. Cro. E. 50. 1 Salk. 63. 2 Roll. 461. 1 Sid. 406.

53.

A defective service of the writ, if it appears on the face of it, is also good ground of abate^{ment} at C.L. But by the C.L. at the writ, tho' defective in point of fact, appears sufficient on the face of it, it cannot be pleaded in abate^{ment} - the return is official. And it is a principle of C.L. that no official fact can be falsified, except by a process instituted for that purpose, & expressly alleging it to be false. 134. R. 393.

The sheriff is no party in the action between D. & P., & consequently cannot appear to defend himself in that action.

The party however may maintain an action for false return vs. the sheriff. Stra. 813. 134. R. 393.

In com. if the return is defective in point of fact, the def. is allowed to plead it in abate^{ment} - & thus at C.L.

Want of
Venue.

54.

Want of venue ^{in local actions} is a good cause of abate^{ment}. In the Eng. original writ, there must be a venue laid. By venue is meant - vicinity or village in which an act is done. 7 T.R. 243. 5 Bae 322. 2 Ch. 48 329. m. 6. Stra 649. 1 Saun. 82. n. 3. 2 do. 5. m. 3. 2 Phil. 126.

But in transitory actions it is not necessary that the venue should be truly laid, & if it is incorrectly laid, it is no cause of abate^{ment}. (See local & transitory) The venue must be laid in the County, in which the ~~action is done~~ is brought.

By the C.L. it was required to lay the venue truly, but the law of venue is now essentially altered.

Where the action is transitory, the cause of action may arise in one County, & the venue be laid in another.

But where the testimony must all be drawn from one County, & the venue is laid in another, the Court may at its discretion change the venue. ^{acts 1828}

An issue in fact, formerly could not be tried except
by a jury, from the very vicinage. Conn. D. action, no 13.
Walt. 89. 70. Comp. 576. 10. 6. 3 East 329. 1 B. & P. 20. 245.
Lawes 741. 1 Bac. 35. Conn. D. action n. 13. #

In local action, a false venue is good ground of
abate^t. Conn. D. abt. l. 17. 1 Bac 24. 466. 23.

Thus in real actions. - Ex. "In, cl. pr", the venue must
be laid in the county, where the cause of action arose.
It could, no more be laid out of the county, than
in a foreign County.

Before Single Magistrates - Justices of the Peace &c;
the venue must be laid in the town, where the cause
of action arose. 1 Bac. 345. - In common lts. the venue depends more
upon the party's evidence than upon where the cause of action arose.

In transitory actions the law of count^y is different,
the venue must be laid in the town in which the
plff. or def. resides.

9th Cause of abate^t is, that the cause of action ~~was~~
~~not complete~~ has been misconceived. Tidd. 577.

This may be taken advantage of, not only in
abate^t, but also under the general issue. Conn. D. ab. G. D.
Lawes 106. Hob. 199. 2 Lev. 197. Ex. as if action in "case" shd. be brought
where it shd. be "account" -

10th Cause of abate^t is, that the Cause of action was
not complete when the suit commenced, & this consti-
tutes a good defence to the action. Ex. - If an action
was brought by administrators in their official capacity,
before letters were issued empowering them, to act
as admin^{rs}, the cause of action would be incomplete,
& therefore pleadable in abate^t. Carth. 114. Conn. D. ab.
G. D. Cro. E. 325. Cro. J. 69. 70. - or to the action.
2 Lev. 197. 1 Show 147. G. Ryels. 70. Hob. 199.

Mode of Pleading in abatement.

55.

Plea in abatement, regularly begin & conclude to the writ, or as the case may be, to the declaration. 3 Bl. 203. 5 Mod 132. 4 Bac. ab. pl. p. 12. Fidd. 584. Doc. Plea, introduct. 1 Hob 197. Lawes 128. q. 160. 4 Bac. 50.

By concluding to the writ is meant, praying judgment off the writ that it may be quashed; the same of the declaration.

There is an exception, which is, when the plea goes to the person. In the case of a plea to the action, it begins & concludes by praying judgment that the plaintiff may be barred of his action. Fidd. 584. Lawes 109.

When the plea goes to the person of the plaintiff, it concludes by praying judgment whether the defendant ought to answer. 4b. Lawes 109.

It is said that the character of a plea is decided by its conclusion, & that alone; - according to this rule, if a plea, whatever may be the subject matter, concludes to the writ, it is a plea to the writ. This, however is not an universal Criterion. 11 Mod. 112. 4 Bac. 50. See May. 694. Lawes 112. 12 Mod. 524.

The true rule laid down by Sel. Holt - that the character of a plea is to be determined by its beginning & conclusion, is supported by modern authorities. Bac. ab. pl. p. 1. 1 Chit. 445. 2 Saund. 209. c. a. Lawes 107. Sel. Warr. 593. 1019. Fidd. 584. 4 Bac. 49. If it begin in abatement, & conclude in abatement, it is a plea in abatement. - so of a plea in bar.

56.

The beginning & conclusion ought to be alike, - but by ignorance & inadvertence they sometimes vary. It is certain however that when they are alike, they determine the character without reference to the subject matter. 1b. & 2 Mod. 503. 2 Saund. 209. b.

The distinctions are very artificial & subtle. -

If the matter pleaded is good in bar only, & if the plea either begins in bar & concludes in abate or vice versa, it is a plea in bar. If both the beginning & conclusion are in bar, the plea is in bar of course; & where they differ, the subject matter decides the character of the plea - the beginning & conclusion neutralize each other.

There is much confusion on this subject. But the last rule seems to be the most correct & definite method of deciding the question.

Then according to this rule, if the beginning & conclusion differ, and if the subject matter is good in bar only, the plea is in bar. If good in abatement only, the plea is in abatement - Even this rule is not universal. 13 ac. ab. 1st. f. 1d. May. 593 1118.
2. Ann. 209. c. d. 2 Ch. 445. 6.

But it seems to be established, that if the matter is good in abate only, & the plea begins in bar & concludes in abate, or vice versa; the plea is a plea in bar when it determines vs the deft.

But if it goes vs the 4th, it is a plea in abate only.

This distinction is made to discountenance dilatory pleas.

It does not agree with the general rule just men^d.
1 East. 636, 1 d. w. 311. 12. 1d. May 1118, 1 Ch. 445.

There is a class of pleadings which come under none of these rules & distinctions.

If the subject matter pleaded, is good either in bar or abate, then the rule is, that if the plea begins in abate & ends in bar or vice versa, the 4th may either answer it as a plea in bar, or as a plea in abate, & as he answers, it will be treated. 1 Bent. 136.

Why this rule? Because the beginning & conclusion
being different, they neutralise each other, & the subject
matter being spoke either way, the plff. has his election.
2 Ch. Jol. 13 La. Hay. 11. 53. 57. 92. 137. Co. Litt. 123. 9
3 Moa. 281. 4 Bac. 50. 1 Vent. 136.

A plea in abate^{ment} founded on matter which goes only in
bar, is bad. ^{vice versa} such matter does not operate in abate^{ment}
Ex- In an action on contract, the def. pleads a
release, this plea in abate^{ment} is bad. It is incongruous
1 Moa. 244. 12 do. 400. 1 Vent. 136. Co. Litt. 128. 9. 6. 6. Bac.
1485. As to the mode of proceeding see 3d ed. Ray. as
quoted above, & 2 Ch. Jol. title pleas in abate^{ment}. Story Jol.
1 Sawes 37.

A def. may not plead at one time, two dilatory
pleas, or two different causes of abatement, either to
the writ or to one & the same party. He cannot plead
to the disability of the plff. two, outlaws or all kinds.
One will abate him as much as two. The law does
not allow two similar grounds of defence at once
Hob 250. 86. Com. D. ab. f. 346. 107. 8. Doe place 6.
1 Tidd. 589. Law. 1078. 1 Bac. 5. 4. 180.

A def. may plead several kinds of dilatory pleas
successively, in their proper order. He may plead
to the jurisdiction, & if that is overruled, to the disabil-
ity of the plff. &c. Law 1078. Com. Dig. abt. 3. 4. 5. 6.
But two similar pleas cannot be pleaded at
once. This is the doctrine of duplicit. Doe place inter
6. Carth. 8. 9. Co. Litt. 304. 1 Tidd. 572. 589. 4 Bac. 118. Holt. 250.

If def. were to plead at one & the same time, two pleas
of different classes, the latter would waive the former.
In Com. & Mass. the practice has been, for the def.
to assign any number of causes of abate^{ment} in the same
plea. This is in direct opposition to the C. L. rule, Story Jol.

When a cause of abate^t is pleaded, & judgment rendered upon it, Error is predicable of that interlocutory judgment, as well as of a final judgment. Suppose a good plea of abate^t is demurred to & overruled, a writ of error may be founded on that interlocutory judgment, but a writ cannot be obtained, until final judgment is rendered. 64 R. 766. Carth 124. Cro. E. 554. Doe. Pleas. 5.

(See Ld. R. 595. 4 Bac. 38.)

When matter of abate^t is no ground of error, unless pleaded in abate^t. If not pleaded, it is waived. Doe. Pleas. 5. 64 R. 766. 3 Bac. 151. - Ib. for he might have taken advantage of it in the beginning of his suit.

In a scire facias on a judgment. The def. is not allowed to plead in abatement any thing, which he might have pleaded in the original action. 1 Saund. 219. v. 1 Sal. 2, 311. Co. Litt. 303. 1 Wils. 258. 34 R. 689. Bac. ab. pl. 4. 12. Stra. 732.

Again a writ may abate in part & yet stand good for the residue. And the Ct may abate as to part of the writ, when the plea goes to the whole. Suppose debt to be tried on two bonds, of 100, but one of them is joint with another - here the plea of nonjoinder will abate as to one, & not as to the other. Serves 106. 7. 2 B. & P. 420.

Two causes of abate^t may be pleaded to different parts of a writ.

E.g. - An action is tried on two bonds, but in one, the day of payment had not arrived, & in the other, another person is joined.

Again, the def. may in some cases, plead in abate^t as to part; & in part as to the residue. 58.

2 B. & P. 420.

Laws 107. 8.

This rule holds however only, when there are two or more counts or causes of action. But where there

is but one ^{cause or} cause of action, I am not aware that there
can be two different pleas. 2 B. 824 20. Lawes 107.8.

As a plea in abate^d does not go to the merits of the
case, it follows that a judgment in favour of the def. does
not bar a future ~~judgment~~ action. 4 Co 43a, 6 Co 6, 8 Co 37.6
9 8, a. Com. D. ac. C. 4. - 5 to 7. 8. 45. Vent. 170.

In general a judgment in abate^d is what is called
an interlocutory judgment. * exception - when

a judgment on a plea in abate^d goes in chief

There are some cases when a final judgment may
be granted in a plea in abate^d. In these cases it is
of course a bar to any future action 4 Co 43a 4 Bac
ab. 4pl. c.

The distinctions on these subjects are these -

1st If judgment on a plea in abate^d go in favour of the
def. it is that the writ may be quashed. If the writ
be not amendable, this puts an end to the action. 2 Show. 44.
1 Ben. 22. Nels. 112. 4 Bac. 51. unless it be amendable by the Stat.
of Amendments. Jeoff. ult. & then the writ may proceed.

2nd If judgment be rendered for the plff. on demurrer,
it is an interlocutory judgment, called "respondent ouster"
i.e. - that the def. answers twice. 37 Hk. 503, 396. 1 East. 542. 4.
Nels. 112. Le. May. 594. Ray 119. (2 Wils. 357. 8. 4 Bac. 51.
6 Mod. 236.)

3rd But when an issue in fact is joined on a plea
in abate^d, & found for the def. the judgment goes in chief;
or "quod non prestat;" according to the C. L. in Eng^l.

(* i.e. that plff. recover his damages &c.)

This is a rule adopted to discourage dilatory pleas
which are false, & if the def. is so perverse as to plead a
dilatory plea, which is not true, the rule intends to pun-
ish him. This rule does not hold in indictments for crim-
inal cases. ^{if a judgment is capital} It is dispensed with, "in favorem vite."

6 Mod. 236. 1 East. 544. 2 Hawk. 294. 1 Bac. 15. n. Lawes. 73.

In Court the rule is adopted in civil cases, with this exception, - if found by the jury it is final, for there shall be but one trial by jury. But if the question is to be tried by the Ct. it has been usual to allow a respondent's master. It is so decided in 2 Con. Rep. 577. # but not so reported - 2 Hoist. 204. ^{as required to J. G. S. personal knowledge.} *City & P. vs. Parsons* #

4. If def. pleads in bar what is new matter of abate, it is bad and judge will go vs him in chief. 59.

It is a rule that the def. cannot demur in abate ^{it is perfect in the writ.} The reason is that new matter of abate is no cause of demurres - If then the def. demurs in abate judge will go vs him. See. Rep. 1020. 1 East 634. 1 El. 464. 505. 410. 49. See. 220. 6 Moa. 195. 88. Sawy 172. Gill. His Com. 46. 208. 7 Moa. 97. 1 El. 451. (Contra Plow. 73) not L.

If he pleads in this manner he concludes himself from pleading again. *Walk. 20.*

The rule does not hold in capital cases. *Walk. 334.* After judge of "respondent's master", he cannot plead again, otherwise he might plead "ad infinitum".

Doc. Plac. introduction 5. 4 Bac. 51. 2 Robt. 120. 2 Linn. 901.

This rule is to be understood of dilatory pleas of the same kind. 7 Moa. 97. 1 El. 457. Sawy 172. Hob 126.

After a plea to the jurisdiction, he may still plead to the disability, for there are distinct species of dilatory pleas. The rule however last-mentioned does not obtain, after judge that the writ abate the plea. *See* his writ. - There has been no judge of respondent's master.

He who amends his writ, makes it from that moment a new one. 2 Saun 40. 1. Doc. plac. 5. Hob 26. Bac 14. 4 Bac. 51. Linn. 5. 0.

When after judgment that the writ abates, as to the new amendment, the def. is still at liberty to plead in abate^t. Rib. 3.5.

After a general imparlanee, the def. cannot plead in abate^t, unless the cause of abate^t arise from the imparlanee. Bac. ab. pl. c. 2. H. ad. 422, 3 & Bl. 316. 4 Bac. 29. 143. 1 Bac. 9.

Imparlanee means, a continuance from one term to another.

But after a particular imparlanee, he may plead in abate^t. 1 Bac. 9.

Restraints on pleas of abatement.

There is a standing general rule, that there is a certain period within which, the def. must plead if he pleads at all.

This period is in Eng^a 4 days after the return of the writ. 3 Blk 316. H. ad. 422. Bac. ab. pl. c. 2. Com. ab. 118.

The period in Conn. is the afternoon of the 2^d day after the ~~setting~~^{showing} of the ca^t. In the County Court at or before the impaneling of the jury. Mot. 504.

When the period for pleading in abatement is expressed & no such plea is made, the right is waived.

One exception in Conn. in the case of foreign attachment, when the law continues the attachment to the second term, the def. is not precluded from pleading the abate^t at the second term.

cc. When a new cause of abatement arises after the time, the def. is not precluded from pleading in abate^t.

Suppose a ferme sole is married after the time of

If pleading in abate^t has expired. The def. may plead the marriage, ^{in abate^t} for a feme sole has no right to continue an action after she becomes feme covert. Lawes. 173, 175. Id. 77. Doe. plac. 297.

This limitation however does not operate as to those pleas which are good both as to the action & in abate^t; but he must after the expiration of the period plead to the action. Doe. plac. 297, Id. 777.

After the writ is abated, the plff. may under the R. of amendment, amend the writ, or paying the costs, except when the writ cannot be amended, as in defects of service &c. See Bac. ab. amend. & prac^{ce}.

Pleas to the action.

61.

A plea to the action may be either a general issue which is a general plea in bar, or a special issue alleging new matter, which is called, a special plea in bar.

An ~~general~~ issue is said to be a ^{single} certain & material point-issuing out of the allegations of the parties, & issue consisting regularly of a direct affirmative on one side & direct negative on the other. Co. Litt. 126 a. Com. D. Pl. R. Bac. ab. pl. &c. g. 1. - 4 Bacc. 54

There is a fault in this definition, the word "material" ought not to be used, for there may be issues arising from immaterial matter, & to comprehend them, the word material should be omitted. It is however a correct definition of a good issue.

According to this definition, there must be, in

every case, except a writ of right - a direct affirm^{re}
on one side, & a direct neg^{re} on the other. 10 Vent. 213,
2 Bl. R. 1312, 8 T.R. 278 Co. Litt. 126, & 2 Bl. R.

If then a pleading alleges that a co. def. was
dead at the time of commencing the suit, & the plff.
was to plead that he was alive, it would be insuffi-
cient. It has already been said that argumenta-
tive or inferential pleading is bad. Now the negative
that the co. def. was alive is here an inference & not a
direct assertion. - The plff. should say "that he is
not dead", or "that he is alive" - # "absque hoc" he is dead.

The rule requires a direct affirmative & a
direct negative to constitute an issue, has in mod-
ern times been somewhat relaxed. - Thus if def.
alleges that he was born in France, it is determined
sufficient that the plff. reply that he was born in
England. 1 Wils. 6. Stra. 1177.

§ 1177 * "absque hoc" i.e. "without this" are, a technical negative in 10 Edw.
The rule is laid down thus, that if the 2^d affirm^{re}
should involve the neg^{re} in the 1st, it is suff.^t This
is relaxing the rule too much.

In a writ of right however, 2 affirm^{res}
were always allowed, & it is for that reason, now
called an issue, but a "mise"

62. Tho' in common parlance it is called
a gen^t issue of a bill of right. with this excep-
tion the general rule sh^d be & gen^t is strictly adhered to
& tho' some relaxation has been admitted, it is safest
to close the writ in the most direct manner, nor is
there any sufficient reason to relax. The direct-
neg^{re} is the most simple of all modes of expression
Lawes. III. 232, 3. 2 Stra. 1177, 8, 9. 3 Bl. 305.

Issues are either General or Special.
Some have made 3 kinds, gen^t, spec^t, & Common.

The only case however in which they say the issue
is common, is that of "Co^t broken"; according to

them, the issue of non est factum; denies the deed but not the breach. 4 Bac. 54.

Now, certainly, what denies the existence of a cov^t denies the breach of it. The same might be said of yence bonds. - I can't see the necessity of these distinctions. Bac. ab. fol. 91. Lawes 113, 110. Yide. 593. 84. H. 282.

A general issue is the denial of all the material allegations in the declarⁿ. A denial of all the facts which the plff. is bound to prove. 3 Bl. 305. 4 Bac. 54.

Genl.
Issue.

A spec^l issue is one joined on some particular part of the declarⁿ which is material, instead of denying the whole. Co. Litt. 126a. Lawes 112, 13, 145. 3 Bl. 315. 1 Sam. 14. n. 3 Sam. 64a. 131n. 205n. 219a. 295b. 301, 33, 47.

Spec^l
Issue.

For when the plff's cause of action depends upon various distinct facts, the def. may often select any one of those facts & traverse that.

The term spec^l issue is predicable of the declarⁿ only; when taken on the subsequent proceedings, it is called simply a traverse or an issue.

Suppose A. sues B. on a right of action wh. depends upon some preceding act being performed. The def. instead of pleading the general issue "non est factum", specially may plead the non performance of the condition.

But if both gen^l & spec^l issues are to be taken on the declaration, what name shall be given to those taken on the subseq^t proceedings? They are called simply "Issues" neither gen^l nor spec^l.

The following are some of the distinctions in the pleas.

To actions founded on any "malfeasance" or tort the proper general issue is "guilty" or "not guilty".

To debt on simple contract: "nil debet"
On specialty: "non est factum"

"Nil debet" is not good in specialty, for it confesses
and does not avoid the debt.

To debt on judgment: "nil tunc record"

To assumpsit: "non assumpsit"

To replevin: "non cepit"

If the def. is charged as Bailiff or receiver - "never
bailiff" "never receiver" ^{To the action of Account}

If both "never bailiff or receiver"

To warranty sounding in tort: "not guilty" 2 East 446.

To debt but on penal stat., the gen. issue is "non debet"
tho' as the claim is founded on an alleged crime,
"not guilty" seems also a good plea. It has lately
been decided to be a good plea. Both are good
14 R. 462. Ch. 257. 4 Mac. 54. 1 Lev. 142. Noy. 56.
Cro. E. 257.

To assumpsit: "not guilty" was formerly the plea,
& held to be a good gen. issue. It seems to be es-
tablished now that it is not good ^{but not a good plea, & not by itself} & that "non as-
sumpsit" is the proper plea. Stra. 1622. Esp. D. 167.
Cowp. 588. 4 Mac. 58. 84. 1 Lev. 142.

To disseisin "no wrong" or "non disseisin" 3 Bl. 505.
4 Mac. 54. 3. Moer. 324.

To ejectment: "not guilty"

63. In debt for rent, it being a simple contract, "nil
debet" is the usual gen. issue. Yet "nothing in
arrene" is a good plea. 1 Brown. 19.

But to an action for "cov^t broken for rent, this is not a good plea, for the reason that it confesses the cov^t & the damages, & alleges nothing in ~~voidance~~ voidance of either, & is of course a bad plea. Corop. 588.

In "debt-on bond" the gen^l issue is "non est factum!" If the def. pleads "non debet" & the pl^{ff}. instead of demurring joins the issue; - this important consequence follows, - that the def. is let into every mode of defence which is admissible in "debt-on simple contract." 1 Ben. 321. 5 Eop. 38, 2 John. R. 183. 8 do. 82. 1 Ch. R. 478, & in the 2d. then gave the estoppel in behalf of the pl^{ff}.

The pl^{ff}. by accepting the issue, places his cause upon the actual indebtedness. If "non est factum" was pleaded, the simple question would be, whether the deed was made or not. Com. Dig. 8. 42.

But if def. is allowed to plead "nil debet," the question is not upon the solemnity of the instrument, but upon the simple existence of the debt. 1 Ben. 321. 5 Eop. 38, 2 John. 183. 8 John. 82, 1 Ch. R. 478.

A gen^l issue always refers to the count or declaration & never to the writ. A plea to the action is always to the declaration. Co. Litt. 126, a. Mac. ab. pl. q. 1.

If in an action of "account," the def. is charged in the writ as receiver generally, - & in the declaration as receiver by the hands of J. S. & he pleads "never receiver" he pleads to the fact of receiving by the hands of J. S. 4 Mac. 54. in. Lit. 120. a.

(Co. Litt. 120. a. 321. 313. 315. #1)

The General issue, like all other issues in fact, in gen^l concludes ^{regularly} to the country, & is ordinarily triable by jury only. Co. Litt. 126. 3 Pl. 313. 315.

The proposition is not however universally true.

There is a trial by record, which does not conclude to the country, but to the Co. because the jury can't try a record.

There is also a trial by inspection, also by certificate, waiver of law, & waiver of battle.

The waiver of law is obsolete.

The waiver of battle was supposed long since to be extinct, but some modern decisions seem to have revived it - These above must be not triable by jury.
Co. Litt 126, 3 Bl 513, 15, 50.

Indeed, generally speaking, the judges try all issues. They try however thro the medium of a jury.

The jury answer the purpose of record, certificate, &c. to determine the truth of facts. It is true to substitute a jury for mere documents does not seem very consistent with our constitutional ideas of its efficacy. Such in these cases seem to be its office.

The general issue of "nul tiel record", concludes with a "verification"; & not to the country, for a jury can't try a record. To this plea, the party who affirms the record, must aver its existence & prove the inspection of it by the Co. 27 N. 443. 2 Wils. 115, 116. 1 B. & P. 411-5 East 473. Lawes 148, 148, 226.

But if the record of a foreign municipal Co. is denied, it must conclude to the country, for the records of foreign municipal Co's are not records in this country. Lawes 148, 226, 1 B. & P. 411. 5 East 473. & must be proved by alibi - its existence is matter of fact proved usually by a sworn copy.

It is a fact to be proved by evidence, as any other fact, but it does not like evidence prove itself. 5 East 473.

The mode of pleading is the same, if the record of a former is averred to be lost, probably by extrinsic evidence, the plea must conclude to the country. - for it cannot be true by inspection, but by extrinsic evidence - 5 East 473.

There is a Statute in Court enabling the parties to conclude by referring the issues to the Court by mutual agreement, in civil cases only, "Stat. Com. ag. civil."

In the same state, issues joined before single ministers of the law, must conclude to the Court, because, as ^{at} jus. ^{of} has no jury.

The records of a foreign Court of Admiralty, are properly speaking the records of our Courts, for they are founded not on the particular laws of one nation, but the universal laws of all nations.

If clerical comes on part of the plaintiff he says, "this he prays may be enquired of by the Court."

If however the issue complained of is negative, the plaintiff puts himself on the country. 10 Mod. 1156, 1186. Co. Litt. 126.

3 Bl. 513, 4 Bac. 54. This is an excep. to 3 pl. 1186, 1187.

The defendant puts himself up on the country.

When one party thus concludes to the country, the issue is closed - the form made use of is "At the said Court, both the like" This is called a "similitur" Co. Litt. 126, a Lawes 114. 3 Bl. 513, 5.

The omission of a "similitur" has been a ground of arrest of judgment. Corp. 407, 3 Bur. 17193, 17194, 641. 1 Saunders 319, a.

It is in Eng. to this day matter of substance.
It is allowed however to correct the omission on very
slight ground.

In Con. a want of sanction is aided by verdict
2 Day 392.

An issue always closes the proceedings. & the
term derives its signification from that circumstance.
In conclusion of the issue are used the words
"in manner & form aforesaid"

These formal words go sometimes to the substance
of the issue, & at others they are mere form. Str. 317.
Laws 20.

"Postea" in Eng. does not prove that they
parties joined in issue upon themselves upon the
Country. In Con. it does. The Eng. resort to
every expedient to elude this rule. Corp 407. Str. 64.
3 Rep. 17 93. 1 Sam. 319 a.

When issue is tendered by one party, ^{it must be acc.} the latter
must join the issue. If it is back tendered, the
opposite may demur to it. 3 Bl. 314. Co. Lett. 126 a.
1 Sam. 338. Carth 86.

With regard to the subject of the words, "in
manner & form" the following distinctions obtain.

1. They do not put in issue the mere circum-
stances attending the principle set in question,
unless these circumstances are material - Circum-
stances such as time, manner, place &c which are not
generally material unless they create a variance.
2 Sam. 319. n. 6. Str. 317. Laws 49. 120.

2. On the other hand, when these circumstances are material, the words "in manner & form" traverses them in issue. This it would seem from the simplicity of the rule easy to distinguish what are traversable & what are not - Some ex. will nevertheless be necessary.

Suppose a case of assault & battery, when the def. is charged with an assault with a sword; now does the issue "in manner & form" traverse the fact of an assault with a sword? No. It would be good of a cane or club, because the instrument & mode of use of is not material.

Now when the words "in manner & form" do not traverse a material allegation, they are but form. When the circumstances form a part of the description, it is material & forms a part of the traversable allegations. Litt. sec 483.

Co. Litt. 281. b. 4 Bac. 56.

If A. sues B. on a bond dated & deliverance on the 1st of July, the time is material & forms a part of the description & is traversable by the words "in manner & form". 4 Bac. 56.

The plff. can't here avail himself on a bond dated 2 of July.

Suppose again that A. charges B. with a battery committed in the county & parish of C.

The place is here mere matter of ~~fact~~ venue & not of local description. 2 East 497 1100. 225. Reg. 15. Mc. N. 501. 5. 7.

The deed may therefore be proved in another county & parish.

But when the place is part of the local descripⁿ it is otherwise. - If A alleges that B committed a battery in the room of J. D. it is a part of the local description his traversable by the words "in manner & form" 2 East 497, 11 Mo. 226, Mc. N. 501 to 503, 50 Keeling 15.

The form thus put, in issue those facts which are material & does not traverse those wh. are not material. 1 Mc. Gally 501-7.

It has been said, that every issue to be a good one must be material.

What then is an immaterial issue?

It is one which having a material allegation on 1 side, is taken on a point which is immaterial 2 Saund. 519 a. 520 b. 1 Lewis 32, Cro. J. 434. 585.

E.g. If the def. traverse matter of mere inducement, ^{if the def. traverse matter of mere inducement, it is an immaterial issue} it is an immaterial issue "a fortiori" if impertinent matter. Id. Carth. 371. or surplusage.

An immaterial issue is a radical fault & can't be aided by verdict.

Suppose an "assumpsit" vs an executor the def. not from. alleges that he did not promise ^{instead of plead at the trial} here if issue is taken, it is certainly immaterial 2 Ven. 196, 3 Bl. 3

When an immaterial issue is found in favour of him who tendered it, a replacitor is awarded.

If vs him it is final. 1 Will. 338, 3 Bl. 339, Com Rep. 148, 2 Ven 196, 2 Moel 137, Bac. ab. 51. p. 1.

When there is no material allegation on one side, there can be no immaterial issue, for since *z* pleading is so defective there is no possibility to take a material issue, & under *z* circumstances of *z* case it is *z* best sh. can be given - Thus if all *z* declar. is ill, *z* Deft. may traverse any part to it. If in such case judgt. is awarded vs. *z* plff. no replader will be (awarded.) allowed.

It is a genl. Rule - "that an issue can't be 66. joined on an aff. or neg. pregnant" - & neg. pregnant if one sh. implies an aff. (& vice versa.) in just 90. 131 favour if the other party. Negative Pregnant.

An issue taken on these at C. L. is not aided by verdict. Co. Lit. § 263.3. Bro. J. 87. 312. Lawes 114. 2 Lams. 319. 6. Gilb. P. C. 147. 5 Bac. 201. 120. 94. 40. 98. By st. 52 Hen. 8 it is cured by verdict, whether for plff. or deft.

There is a distinction to be observed between an issue taken on a negative pregnant & an immaterial issue. The immaterial issue contains nothing material, but an issue taken on a negative pregnant is taken on both material matter & immaterial. A negative pregnant is ill only on special demurrer.

To an action on "contract" *z* Deft. pleads usury with a reservation of 10 per. ct. - & plff. traverse 30. 10 per. ct. was ^{not} reserved. This however implies that there might have been nine per. ct. - The plea however is good.

When *z* aff. contains in a neg. pregnant does not do what is alleged on the other side *z* plea is good.

L. C. 4. 1803 B. on an action th Battery; B. pleads 30. he had a right to accept A. & in virtue of

his legal right he "mollior manes imposuit".
It pleads that he did not gently lay his hands on
him. Now this implies yt. he might have laid
violent hands on him or not. Cro. E. 227. 2 Lound. 317.

Laves 114. has exactly reversed the meaning of
this rule. There is great inconsistency, con-
tradiction & confusion between a negative seg-
nant & an informal issue. An informal issue
is one taken in point of form only. This being
a fault in form only, is clearly added by ver-
dict. Traversing a negative segnant in
technical form, "absque hoc" is informal.

2 Lound. 319. n. d. 3 Bl. 398. Barth. 371. 4 Dac. 50.

It's not an issue wrongly taken in point of
form on an immaterial allegation informal?
No. For a greater fault if it's being on an im-
material fact characterizes it. 3 Bl. 398, Barth. 371.
1 Lev. 32 2 Lound. 319. n. d. 2 M. 137. 10 id. 19.

The genl. issue covers the whole record & by this is
meant (by this is meant) yt. the Deft. may tra-
verse any thing contained in the record. This plea
in its nature does not involve any other than
matters of fact. 1 Ch. Bl. 478. 10 id. 134.

As a matter of record the genl. issue is considered
as covering every material allegation. Tho
such is the effect on the record, yet the Deft. may
not intend in reality to contest a single point.
Suppose an action brought on a bond made by
a feme covert, she may admit the making,
sealing, delivery &c. & yet plead her incapac-
ity to make one. 1 Dow. i. 37. Fulk. 7.

In point of law she is morally incapable of
making one. The case is a "casu blanche" &
ergo she may plead "non est factum", Fulk. 7.

Tho' an illegal inst^t is certainly void & can not impose an obligation on a person, yet where there is no incapacity of the party drawing it, a defence of non est factum is not enough. 3 Co. 114 a. b. Esp. 223. 2 Bl. R. 5, 3. 2 Bl. R. 1108.

There are several defences wh. may be given under a genl. issue. 3 Co. 119. 11 ib. 27. a. Esp. 223. 4.

Thus an erasure may be given as a defence in a debt. may plead yt. he did not make the deed as it now is & consequently yt. it is not legitimately of same.

The loss of a seal may also be pleaded under a genl. issue. for a inst^t is not legal without one.

We are not to understand however yt. a p^{ty} shall lose his cause in such a case. He wd. have his remedy in a bill in Eq.

Now where a seal of a deed was destroyed by mice, an action of debt will not lie, nor is any action at law, a proper course to be pursued is by filing a bill in Eq. & a deed thus charged becomes an agreement in writing & is of equal force with any unsealed inst^t.

The want of delivery wd. also be a good defence. & Now advantage may be taken of all these defects under a genl. issue. 3 Co. 119. a. b. 11 ib. 27. a. Esp. 223. 4.

It is a genl. issue rule yt. matters of fact only are put in issue under a genl.

issue. There is an exception however in case of a general issue. before mentioned, this is "qui generis."

1 Ch. Pl. 478. Rep. 224.

Matter of law under a general issue may be brought under a general issue. This is not the case supra, Ch. Pl. 478.

What defences are admissible under the general issue.

68.

If a defence is admissible under a general issue, it must be consistent with it. e.g. Suppose an action brought on a deed any alteration of the deed may be brought under a general issue.

Infancy, insanity, duress &c. can't. The reason is that these defences are inconsistent with a general issue & therefore inadmissible.

In an action of "indebitatus assumpsit" there is a very great license allowed in a defence. For in this action a rule is, that any thing which shows that the plaintiff at the time of the plea pleaded had no right to recover may be given in evidence. ^(i.e. general issue) In this action of promise is always fictitious, a mere legal consequence. The material fact in question is of fact & whatever disproves a debt or duty disproves a promise.

On this account I do not consider this as an exception to a general rule. For a plea of "non assumpsit" means that the defendant did not make a promise. Hence under a plea of "non assumpsit" a defendant may give in evidence insanity, duress, release, infancy, coverture, payment, specially given for a sum of debt, avoidance of satisfaction, or any illegality in the instrument. Now none of these can be given in evidence under a plea of "non est factum".

Winds. 498. 4 Bac. 601. 2 Roll. 682. 3. 3 Brev. 1553.

2 H. 1010. 2 H. 782. 2 H. 15. 143. Doug. 108. 1 Ch. Pl. 470.

(5 East 230.)

to accord & satisfaction by & weight of opinion.
- Ch. Pl. 172. Le. R. 566. 12 Mod. 378.

995 to accord of a bond given in "apt." many diff.
opinions on this subject.

Does the same rule hold as to special assumpsit?
On principle I think y^t. none of these defenses will
be admitted in evic. for where there is an express prom-
ise there is an incongruity with y^e plea.

The authorities however hold y^t. the same rule ap-
plies to special as to genl. ass^t. It originated
in mistake & has been extended by precedent.
Ch. Pl. 172. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

But in practice the rule applies to both genl. &
special ass^t. See *Wheatsfield* in one instance
seems to lay the same rule in relation
to actions on y^e case generally, but this can't
have been his meaning. 3 Burr. 1353. 4 Burr. 61.

I observe here on y^e other hand y^t y^e ass^t of con-
ditions, tenor, bankruptcy, & sett. off. must be in all
cases upon Co. L. principles. Specially pleaded,
& can't be given in evic. under y^e issue of non ass^t.
Ch. Pl. 172. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

69. The reason is sd. to be y^t. then are matters of
law wh. go not to y^e "gist" of y^e action but to y^e dis-
charge of it - this is a soleism perfectly unintell-
igible. Whatever goes to y^e discharge of y^e action,
is not y^e "gist" of it.

The true reason is y^t. they are defenses &c. be-

ing matter of law & equity; action or remedy but so
not destroy of indebtedness.

In all these cases, plea admits, debt not de-
nies & right of recovery. The debt is due "in fact
conscientia" but remedy is taken away by st.
of limitations. *Strong v. S. 800. 1 Hand. 283. n. 2.*

The rule holds as well of "indebted
apt." as of "special apt." on C. L. principles, *1 Hand. 283. n. 2.*

But of mode of admitting special matter of de-
fence under of genl. issue is not allowed at C. L.
in cases of trt any more than in actions of
specialty, for all these defences are inconsistent
with of genl. issue "not guilty". Thus. take a
case of release, of debt. Pleas a release - i.e.
justification of a fact wh. in of genl. issue he de-
nies. He of a license. He of any
justification in an action sounding in trt -

*Vide "Assault & Battery" 4. Bur. 60. 2 Roll. 652.
5 Mod. 252. Hob. 174. 5. Co. 478. Rep. 317. Br. 17.
Co. Lit. 282. 6.*

In "debt" or simple contract of st. of limitations
may be given in evd. under of genl. issue.

I think so of all these I have mention-
ed under of plea of "non apt.". In "debt" because
says *Ed. Holt* of plea "nil debt" is in 3 present
tense, & as it denies of present indebtedness, it is
inconsistent with of genl. issue.

He of a release. *Ed. 829. 153. 866. Falk. 278.*

*Rep. 262. 5 Mod. 18. 1 Hand. 283. n. 2. 2 Lev. 215.
2 H. B. 255. Doug. 108. Co. 588.*

The st. of frauds & perjury may be specially
pleaded under "nil debt", under of genl. issue.
1 Bro. C. 92. 1 Ch. D. 470. 1. 2 Lev. 214.

Why on principle is not γ H. of Limitations under
 γ genl. issue or inhibiting apt. non assumpsit?

The its language is in γ past tense it is in legal
operation in γ present & refers to γ time of pleading.

Hence every defence admissible under nil debt
id. seem to be so under non apt. at least in
inhibiting apt.

In γ action of "apt." advantage may be taken
under nil debt γ genl. issue of γ H. of frauds.

There is no necessity for it but it may
be done. The deft. may plead γ genl. issue
& object to parol testimony. 2 Loe. 219, 1 Bur. Ch. 91
1 Chitty Pl. 470. 471.

The debt on simple contract γ H. of Limitations
may be given in evid. under γ genl. issue. I
think so of all those that I have mentioned un-
der γ plea of "non apt." In debt because says
Lod. Holt &c. as on γ last page.)

70. It is an universal rule yt. every defence to γ
action wh. can't be specifically pleaded may be given
in evid. under γ genl. issue. But these special
defences above mentioned sh. might be given
in evid. under γ genl. issue may be pleaded speci-
ally. The only reason why a defence can't be
specifically pleaded is, yt. it amounts to a genl.
issue. Every defence must be admissible un-
der some plea to γ action & there are but 2
such cases viz. genl. issue & γ special plea
in bar. If γ rule were otherwise a person
might have a good defence & yet not be able
to plead it. Lawes 111.

These distinctions are derived from
 γ C. L. but are not universally held in prac-
tice.

The statutes of diff. States allow other defences to be given for a purpose of liberalising & giving advantage to those ignorant of law. The consequences have however been mischievous. The number of ignorant has truly been increased.

In Court. it is a rule introduced by St. & applicable to every action, & it is deft. may give in evd. under a genl. issue, any matter of defence or justification wh. goes to a action, except some act of a ptty. by wh. a deft. is saved or acquitted from a ptty's demand. It. Court. 42. In this state the consistency of a defence with a issue is not a criterion. Rule of Chancery as to notice.

The act of a ptty. here meant is some act wh. operates as a discharge of a right of action once existing. E.g. Release, accord, award of arbitration, former recovery & Whist 218. not one wh. goes to show there never was a cause of action. Hence an action of ptty. defendant to a alleged cause of action & wh. operates as a justification may be given in evd. 2 Whist. 238.

So I presume of any other act of a ptty. wh. shows yt. he never had a cause of action except duress. 1 Barb. 237. In action in Court. - so wrong. Infancy. &c. 3 Day 68.

In Court, a St. of Limitations may be given 71. in evd. & a deft. may rely upon it as his defence under a genl. issue in Book Debt. Tort. In case of tort in Eng. & Bac. 61. 3 Bac. 578.

It is sd. by Whist it can't be given in evd. in a summons, because it contradicts a plea not law- said yt. it is not a criterion under our law. 2 Lev. 215. Long. 108. Cowp. 590.

In Book Debt a release may in Court be given

in evidence under a general issue & exception in *St. supra*, notwithstanding, for *St.* does not intend to prevent a Deft. from giving in evid. under a general issue any defence wh. he might at C.L. have proved under a general issue. But to enable him to avail himself under that issue of defences wh. are inadmissible at C.L. & a release is within the scope of a general issue is equally admissible under it on the C.L. principle. 2 Day 272. L.R. 356.

Halk. 278 Coops. 508. See as to "indubitable ass't." under *Brace vs. Catlin Supra Ct. Feb. 1804*. Ct. of Exors June 1804. See as to the correctness of this determination.

The Rule of a Ct. requires that a Deft. shall give notice of a defence wh. he intends to offer - vide last page.

Spec. Plea. The Deft. may instead of pleading the genl. issue deny any single traversable allegation wh. goes to assist the action & conclude to a country. E.g. in "Covenant Broken" of a P'ty. over performance of a condition precedent, a Deft. may traverse this single allegation & conclude to a country. *Lives. 135. Com. 2. 2. 1. 250. Co. 2. 7. 250. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.*

72. The issue thus tendered is a special issue. If a plea tendering an issue in this manner is made as answer to a writ only of a Deft. a residence must be answered in some other way. - Is it more proper to place this plea & its exceptions under special, than in bar? -

There are some defences wh. cannot be pleaded specially. A special plea (i.e.) one alleging new matter, amounting to a general issue, can't be specially pleaded. Every thing is new matter, except what denies an allegation on the other side. And he who pleads specially that amts. to a genl.

issue, places matter of fact to a genl. issue, belongs only to a jury & it lengthens & needs unnecessarily & tends to raise a more question of fact to a genl.

A special plea is said to ant. to a genl. issue, when a special matter alleged in it goes incidental to all the allegations in the count. E.g. In trespass & pleading property in a stranger or in defending himself in trespass, for such pleas tho' they allege substantive facts in the form of new matter, are in effect a new denial of the plaintiff's allegations, & unless nothing ought to be thus specially pleaded by the deft. except new matter, & legal sufficiency of which it may become necessary to determine.

4 Bac. 60. 2. Hobt. 127. Cro. Eliz. 208. 229.

Wils. D. 318. 313. 1 Vent. 294. Jenk. 269. Cro. C. 137.

3 Lev. 41. 2. 210. 3 Bolk. 209. 10 Co. 95.

If deft. in an action of trespass sho. (as above stated) plead that the property was his, he pleads a very fact sh. was to be proved before a jury under a genl. issue.

A special plea ant. to a genl. issue when the facts stated in the plea deny the count. (vide sup.) that in the case stated of a plaintiff's trespass on his land. but B. pleads that the land was his. But if any other have the deft. were to plead justification it wd. not deny the count.

Title is pleaded specially in Count. to Trespass on land by Stat. so at C. L. by giving colour. 3 Bolk. 209.

To a genl. rule (above i.e.) yet a special plea amounting to a genl. issue is regularly inadmissible, there are exceptions.

II. If special plea amounting to a general issue is good if it contains special matter of justification. 4 Bac. 61. 3 Leo. 40. Cro. E. 268. Esp. 2. 218.

5 Bac. 262. (see an exemplification of this rule Bac. 26. 4. a. s.) 1 Sand. 298. n. Halk. 107. 8. Cro. E. 2. 17. Sand. 298. n. 1.

For when a defence is compounded of a general issue & special matter of justification, it must be pleaded specially; for matter of law ought to be shown to the Ct. & a justification is matter of law. 1 Sand. 292. n. 1. Cro. Lit. 282. b.

3 Mod. 137. Salk. 107. 4. 1 Mod. 374. 5 Bac. 60. Holt. 127. 243. Cro. E. 2. 17. 8. 37.

73.

II. Where a special matter pleaded involves some legal scruples - some nice points, the Ct. in its discretion may allow such a plea in some cases. If in the language of (Holt.) the fact pleaded may breed a scruple in the Lay Justs. i.e. the Law Justs. 4 Bac. 62. Cro. E. 871. 2 Mod. 162. n. 1. Holden if a defence is mere fact, as in the case of a depts. pleading an alibi in an action on Tre. 243.

III. In "Trespas" or "Assize" a special plea of title giving colour is good. 10 Co. 90. 88. 30 Bk. 309. Lawes 51. 126. 150. Cro. 2. 122. 4 Bac. 102.

Such pleading is according to some authorities proper cause of demurrer, according to others it is not, but if a motion to the discretion of the Ct. praying an order to the Dept. to abandon this plea or to abandon this defence, the latter is the proper course in Court. 9th to 3rd first opinion 10 Co. 93. a.

4 Bac. 60. 124. 5 Bac. 202. Cro. E. 112. 157. 1 Bk. Pl. 498. Inst. 306. But still it seems the Ct. may in its discretion allow it. 2 Cro. E. 871.

Therefore, according to the

other authorities it is not regularly a cause of de-
murrer. but if a motion to γ Ct. γ t. γ genl. is-
sue or "nil obstat" may be entered.

This seems to be γ true rule, for it is deemed
expedient γ t. γ Ct. shd. have a right of ex-
ercising a discretion in allowing or disallowing the
plea, but no discretion shd. be exercised if γ plth.
do claim as of right, a decision upon demurrer.

5 Bac. 201. 1 Whit. Pl. 498. Hobl. 127. Cro. J.
175. 165. 2 Allod. 274. 5 Mod. 18. Co. L. 203. b. So decid-
ed in Coml. 2 Day 431. The former practice was
to demur.

But if γ Ct. will not allow γ plea & γ deft.
refuses to plead γ genl. issue & joins in de-
murrer judgt. will go against him. The plth.
however can never be driven to γ necessity of
demurring. 4 Bac. 134. 10 Co. 84. Jenk. 306.

In this case therefore it is correct to say γ t. γ
plea is all on demurrer, or after γ Ct. has
disallowed γ plea, if γ deft. will not plead γ genl.
issue γ plth. may take judgt. by "nil dicit" 5 Bac.
202. 4 Bac. 61. Cro. L. 165. 219. Bac. abt. pl. b. a. 3.

* This is a much more summary & convenient
method.

But there is a material diff. between a special
plea amounting to γ genl. issue & a special plea 74.
alleging facts wh. in evd. may support the genl.
issue, for the latter does not necessarily as a plea
amount to γ genl. issue. e.g. pleas of release or
assumpsit on debt or simple contract. Instance
in γ action of assumpsit, a release may be
given in evidence under γ genl. issue, yet it may
be specially pleaded, do they not amount to
 γ genl. issue? No. for they all admit γ debt, & a
release admits that a promise was given, & also
pleas of Infancy, Duress, coverture &c. Ch. on Pl. 197.

Le. Rd. 88. Salk. 394. 3 Mod. 18. 4 Bac. 62. 134. 5 Co. 75.
Carrth. 356. These defenses do not amount to a
genl. issue, tho they might be given in evidence
under it, Lawes 112. Tidd. 599. 591. for they do
not deny facts alleged in a decln. as a genl.
issue always does but go in evic. of them.

But what distinction then shall we distinguish
between these two cases? The plea in genl. wh.
admits that there once was a cause of action
as release of payt. Le. Rd. 217) or of t. & allega-
tions in a decln. are true (tho it denies it. then
was a cause of action as Assury, dump &c.) admits to
a genl. issue tho 3 facts pleaded might have
been pleaded under a genl. issue & wd. have
supported it. Le. Rd. 88. 566. 789. 1 Ch. Pl.
491. 6. 1 B. & P. 273. 4 Bac. 62. 134. Chit. 23 197.
Bro. C. 871. Salk. 394. Co. L. 2026. 283. a. Com. 2. 4.
Carrth. 188. for such pleas do not deny the
decln. (but sup. eg. last given)

In such cases the defence is matter of law,
i.e. new matter, & legal sufficiency of wh. may
come in question. e.g. Time covt. may, to debt
on bond made during covt. plead her covt.

Le. Rd. 88. Lawes 129. 1 Chit. Pl. 437. 470.
12 Mod. 101. 8 T.R. 345. Le. Rd. 566. 787.

Advantage is taken of her coverture in this case,
not by way of privilege as being sued alone
when she is liable to a suit with her husb.
(as is done in abatement) but as rendering a
coverture void. (for 3 forms of a plea in bar
see Chit. Plog. 523) She thus admits the
facts, but avoids them by matter of law.
The release is in debt a simple contract.

And in Court it is customary to plead

other defences specially beside acty of 7 p'ty. espec-
ially in actions on the in cases on torts, 7
genl. issue is almost always pleaded.

Pleading specially in form of special plea, what a-
mounts to 7 genl. issue is warranted on a plea of tres-
pass by giving colour to 7 p'ty. i.e. by alleging
some alleged matter in p'ty's favour in order to
justify, in answer to it a special abatement, if def'ts.
title. 4 Bac. 102. 5 Bac. 208. Lawes 30. 52. 126.
Co. 88. 90. Cro. J. 122. 3 Blk. 309.

By giving colour to 7 p'ty. is meant 7 ascrib-
ing to 7 p'ty. a title defective in law in order
that 7 def't. may allege another title in himself.

If 7 def't. allege a title solely in himself he pleads
a mere matter of fact to 7 Ct. but by giving
a title to 7 p'ty. 7 question of superiority ar-
ises, wh. is one of law & not of fact. The p'ty.
can't deny 7 title given him, but he may deny
7 def'ts. title.

This title in def't. is a good defence under 7 genl.
issue. Lawes 126. 3 T.R. 403. 7 T.R. 554. 2 Bl. 21. 552.

But 7 def't. in trespass may plead *liam tenementum* 75.
1 Land. 294. 6 - without giving colour.
Lawes 128. Story Pl. 128. 561. 2 Chit. Pl. 557. 1 Com. Dig.
Pl. 3. m. 34. 40. Willis 218. Note it ~~is~~ not always
deny 7 def't. as 7 p'ty. may still have some right
e.g. a proprietary title

This rule depends upon 7 doctrine of common bar
explained in Willis 218. 1 Land 299 b. m. 6. 2 B.R. 1089.
7 T.R. 387. 2 Blk. 453. 6 Mod. 117. 2 Ld. R. 333.

Common bar was in one case held not traversable
Cro. J. 594.

This is not Law 6 Mod. 119 Wells v. 1 Sand. 99.
Locus when a pleading will go only to a paper

In replying matter of title to a plea of title, a
plea need not give colour. 1 East 212. but he
may do it Laves 157. 1 East 18. 212. Du. v. d. it
not be ill on special demurrer? Laves 158.

A plea stating genl. facts wh. go to prove the
genl. issue & concluding with a genl. issue, is
not a special plea, for it concludes with the
genl. issue.

It contains however special matter like a
special plea. These facts are only a ground on
wh. a deft. relies in pleading a genl. issue e.g.
to an action on bond, &c. a writing was delivered
to J. S. as an escrow &c. so not his act.
So also &c. a bond has been attested by a deft.
&c. so not his act.

So in an action on deed a deft. may plead &c.
at a time of making a deed she was a feme
covert. &c. so not her act. This is called a genl.
issue with an assent. Gilb. L. evid. 164. 6. 4 Bac. 62.
89. 3 Com. 85. 7. Halk. 274. Esp. 222. according to others
it may conclude with a verification Gilb. evid. 164.
5 Q. B. 112. Moore 20. "assent" - from French meaning - "and so

It seems extraordinary &c. any diversity of op-
inion on this subject shd. ever exist. But if it
does so conclude, i.e. with a verification, it wd.
seem to be not a plea of this kind, not a genl.
issue with an assent, but a special plea amount-
ing to a genl. issue. It is useful in giving
notice to a deft. of a true defence & confining
a attention to a jury to a particular facts stated
in it. Gilb. evid. 163.

The plff. it is so may plead over & take issue on a special matter. Halk. 274. But what possible use can there be in doing this? For a special matter is an issue of course, if not removed to & 3 deft. is bound to prove it, indeed it is a only matter in issue under a plea.

It may be removed to (), tho it concludes to 3 country, Gillb. ev. 164. for a special matter may not in law support the genl. issue.

Anciently a scd executed in point of form, was originally void by reason of something extrinsic as coverture, or became so by something ex post facto, as inassure or interlineation of deft. Es. not plead a genl. issue except with an "assint"

6 Mod. 318. It is not now so Gillb. Ev. 164. for a scd rule see 3 Co. 119.

Lord Holt says a special "non est factum" is always impertinent, as it subjects 3 deft. to the onus probandi. 4 Bac. 64. 6 Mod. 218. Que. How impertinent? It subjects 3 deft. to 3 onus probandi, but it may be very convenient in narrowing 3 inquiry witht. prejudice to him, & if 3 deft. is willing to assume 3 burthen of proof, it is a little difficult to say why it is impertinent. On 3 other hand it is convenient in narrowing 3 inquiry & warning 3 plff. what grounds of defence 3 deft. will take.

II. Special Pleas in Bar.

A special plea in bar is usually confined to be one wh. denies 3 facts stated in 3 decl. and

avoids them, 4 Bac. 66. Doug. 66. Lawes 129. 37. 115.

This tho' quasi true is a defective definition for a special plea in bar sometimes traverses part of a decln. 4 Bac. 70. 93. Hob. 104. Esp. 315. 1 Vent. 75. 9 Cr. E. 30. 318. Lawes 18. 21. 48. 116. e.g. Den. in trespass. plea, licence or such a day with a traverse as to other things.

77. A special plea in bar I shd. define to be "one wh. alleges special matter in bar of a action & concludes with ^{a verification} an avermt. It regularly admits all traversable allegations wh. it does not traverse, & goes in avoidance of what it admits. 4 Bac. 273. Falk. 91. 1 Will. 388.

Note - There is one kind of plea wh. is good, tho' it neither admits, avoids or denies the plffs. allegation strictly speaking, but shows y^t. y^t. plff. is precluded from averring a facts alleged by him, & of course neither admits or denies them - these kind of pleas are called pleas in Estoppel. #

There is an exception to a genl. rule advanced above.

Lawes 6. 28. 40. 61. 70. 150. 155. 3 Bth. 208. Willij 13.

2 East 363. 346. "Evidence" # & shows the recd. 1

The actions sounding in "tort" & most usual plea in bar, is a plea of justification.

It is a rule in pleading, y^t. every plea in justification must confess a fact intended to be justified. 1 Saunders. 28. n. 1. Esp. 318. 3 T.R. 298. 1 Saunders. 14. n. Falk. 294. Carth. 380.

It sd. be preposterous to justify what is not admitted to exist. This however may mislead, for by saying y^t. it must admit what it justifies, is

meant, yet it must be so pleaded as not to deny it.
It must tacitly admit it.

As if matter pleaded in excuse. 1 Sand. 28:
120.6. Thus if in response for battery & deft. instead
of denying or confessing & avoiding, justifies an act
wh. does not constitute battery, & plea is ill on
special demurrer. 1 Chaud. 14. ~~220.2~~. The fault is
only formal. 3 Blk. 309. # taking a hat off a man's head
in church.

A party may expressly admit an allegation
on the other side, wh. operates in his favour, &
thus makes it a part of his case. Lawes 183.

Any fact, not in express denial of an allegation
of the other party, is new matter.

(But a demurrer neither alleges or denies any facts.)

A special plea in bar in every instance ne-
cessarily alleges new or special matter, & it is
usually in the affirmative, tho. not always, some-
times it is in the negative - If an action is
brought on a negative covenant (see "Cout. Broken" &
Blk. 309) a special matter must be negative,
hence it must regularly conclude with a veri-
fication thus "& this he is ready to verify".

The form of verification is artificial. This form
is the only mode of keeping the pleading open; for
when new matter is alleged by the deft. the plff.
must evidently have an opportunity of pleading
to it in either of these ways, by denying them, by
demurring to it, or by confessing & avoiding it,
by new matter of his own. Hence till a pre-
scription is tendered, the pleadings must be kept
open, yet each party may have an opportunity
of answering the allegations of the other. Lawes 189.

1. Land. 2. 103. 3 Bk. 309. Long. 38. Coops. 375. 2 Bur.
252. 3 do. 1925.

78. There is an exception in y case of a plea
of Bankruptcy under Stat. 3 Geo. 2. Laws 15. 27.
145. 224. now the debt may put himself upon the country

This is; only case of kind known to the law.

Plea made negative need not be verified. For one
pleading negatively can't reasonably be required
to verify. The debt. may prove himself, with
verification. A negative special plea in bar
however may be considered with a verification, tho
this is not y custom. Laws 145. Thilly & as one
can't in debt. be expected to prove a negative.

But pleas wh. you or rather tender a complete &
proper issue triable by jury must conclude
to y country. 3 Bk. 309. (H. Kaye 98. Carth. 38.
Laws 145. 3 Bk. 309) otherwise y pleadings might
never be brought to a close.

The plea in y former case must have y plead-
ings open, in y latter must conclude to the
country.

When y debt. alleges distinct matter of defence
to diff. parts of y act. (or cause of action) he
may conclude each separate matter of defence
with a ^{several} verification, or y whole with one genl. verification

1 Land. 358. n. l. - do. 359. n. 1 Bk. 298. 312. Carth. 43.

Requisites. I have observed yt. all pleas in
general admit of course what they do not deny
i.e. all material allegations in. They do not
deny. Hence "nil debet" is not a good plea
to debt in bond; for y execution is admitted and
y cause of action not avoided. The plea alleg-
es nothing in evid. of it. 4 Bac. 85. H. 30. 332.

1. *Quidd.* 39. 1 *Liv.* 140. *Ld.* *Red.* 1300. 2 *Strange* 780. 778.
1300. 2586. It is ill on *gent.* *Remedies*. 2 *Wils.* 10.
250. 224.

Ld. *Coke's* *gent.* rule is, y^t. every *Capt.* must
plead such a plea as is pertinent & proper
according to y^e generality of y^e case, estate or interest.

Coe. *L.* 285. 303. 4 *Bac.* 83. This is nothing more
than saying every plea should be a good one.

II. Every special plea should contain iss-
uable matter, scⁱp. it is not triable. E. G.
If y^e *deft.* in an action on bond pleads y^t. he
always has been ready to pay y^e Debt & enough
paid. more is not good, because it is not
issuable; beside y^e fact is immaterial, for it
is no performance of a contract y^t. he sh^d. be ready
to pay. *Livesey* 57. 137. 2 *Wils.* 76.

Every special plea, in wh. facts & law are so bl-
ended y^t they can't be separated, is ill (e. g.) y^t. A.
lawfully enjoyed y^e goods of felon in such a place.
4 *Bac.* 68. 2 *Moo.* 55. 9 to 25. a. *Livesey* 138.

III. Every special plea must, as far as is practi-
cable, separate matter of law from matter of fact.
In a word where matter of law & fact arise from
y^e same defence, y^e matter of fact must be so
collied as to be distinctly traversable, thus in y^e
case just stated. y^t. since B. for trespass & B. pleads
y^t. y^t. is an attainted felon & y^t. B. has a
lawful right to y^e goods of all attainted felons -
such a plea is bad, for it blends matter of law
with matter of fact.

He ought to show y^e special matter on which
y^e right was founded. He sh^d. plead y^t. he
created y^e right.

A traverse to a allegations in a above form do.
embrace all matters both of law & of fact, &c.
do. go to establish such a right. 3 Bac. 68.
2 Mod. 55. 9 Co. 23 a. Bac. ubi. pl. ...

III. A plea in bar to a whole cause must
answer a whole grievance or cause of action,
aliter it is ill for a whole. (e.g.) A. sues B.
for "Assault & Battery" & mayhem" if B. pleads
to a whole justifying a Assault & Battery, only it
is ill for a whole, & a plff. may come to
this, & a jury in assessing damages, must give
them for a "Assault & Battery" as well as for the
mayhem.

The same rule holds as to a subsegt. proceeding.

Suppose A. brings an action on cont. v. B.
for \$1000. B. pleads Infancy. A. replies that
\$500 were for necessaries. A. judgment must go
for a whole sum; for an entire plea can't
be divided in its effects. Laves 17. 115. 1 Lums. 28

268. 3 Bac. 86. Cro. E. 268. 2 Lev. 375. Hobt. 127.

1 Lev. 15. 15. 2 Sp. 318. Ld. Rd. 229. 5 Com. 635.

pl. E. 1. 1 Lums. 28. 268. n. 1. 200. 50. 127. 210 689.

100. 168.

So in "Traverses" if a release be pleaded, all tres-
pass afterwards must be traversed Hobt. 104.
1 D. R. 636.

Thus a replication must answer all that
is material in a plea. As to a application
of a rule to subsegt. proceedings see 1 Lums.
28. 327. 2 Lums. 127. 1 D. R. 40.

But this genl. rule does not prevent a deft.
from making difft. pleas to difft. parts of a
decl. or alleged cause of action. Laves 101. whether
a decl. consists of several counts or one only -

e.g. suppose in 3 case of assault & battery & mayhem
yt. D. pleads an official right to arrest, & as to
mayhem pleads self defence, 3 plea is a proper
& good one.

So again it trespasses for horses, not guilty as to
all except one as to yt. justification. So if ap-
prentice for \$1000 as to \$500 non assumpsit, as
to 3 residue still off in part. &c.

But all pleas taken together must cover 3 ground
of action.

If however matter pleaded as an answer
to 3 whole decl. a grievance is in law a good
answer to part only, 3 plea is bad of course as
to 3 whole. (e.g.) In an action against a bailee
for goods delivered to him to keep & carry & plea
to 3 whole yt. he was discharged from keep-
ing them is ill for it does not answer 3 obliga-
tion to carry them. 4 Bac. 88. Hobt. 28.

And every plea to 3 action is taken as a plea
to 3 whole alleged cause of action & is expressly
limited to a part.

So on 3 contrary if matter sh. sh. be
sufft. answer to 3 whole in law he pleaded to
part only 3 plea is bad. Loeys 155. 171. Lalk. 179.

4 Co. 62. 1 Lams. 28. Cro. E. 268. 220. & 224. Cro. J. 27.
(e.g.) e.g. sup D. in assumpsit for a debt of \$100
by D. pleads as to \$50 part & parcel of 3 whole a
receipt or release of all demands witht. further
answer. This wd. have answered for 3 whole,
but being pleaded for part only is ill.

In an action for words "she is a thief & has sto-
len \$20" a plea yt. she is a thief & stole two

lancs, is ill. 4 Bac. 89. Cro. J. 676. 2 Roll. 514.

80. As to 3 mode of taking advantage of such pleadings.

II. If 3 pleads being as (i.e. purports to be) an answer to 3 whole decln. & is in law good as to part only, 3 plff. may demur, for there is an answer to 3 whole tho' an insufft. one (e.g. 3 & decln. for assault & batty. & mayhem a justification pleaded to 3 whole stating facts sh. in law justify 3 assault & batty. only - for instance if it shd. be pleaded a right to arrest in "manus molles in-potuit". 1 Lenc. 248. n.s. Falk. 179. Le. Rd. 221. 1 Traug. 303. Laves 135. 1 Lenc. 28. n.s.

III. But when a defence is pleaded in answer to part only sh. in law is answer to part only, it is discontinuance of 3 dect.

This is not demandable. It is as if he pleaded nothing & 3 plff. is entitled to obtain a "nil dicit". The plff. not only need not demur but he must not, for if he demurs he accepts an answer to part for 3 whole (e.g.) decln. as above & some justification pleaded as to 3 assault & batty. only & no answer to 3 mayhem - 3 plff. shd. not demur, but take judgt. as by "nil dicit".

4 Co. 62. 1 Lenc. 28. n.s. Falk. 179. 8.

Le. Rd. 221. 841. Stra. 202. Laves 135. 4 Co. 62. for he is not bound & ought not to accept an answer to a part only, & may urge that it is no answer - If he demurs, whole decln. is discontinued. 1 Lenc.

for by thus consenting to try 3 sufficiency of a part only of his cause of action he waives it as an entire right & refers to 3 Ct. 3 decision of only a part of it, sh. can't be done.

For a Ct. of justice will not try an aliquot part of a claim. It can't give judgt. on a

part only of an alleged claim or cause of action.
It must in some way extend judgment to whole.

III. Suppose a matter pleaded to a part only
w^d. have been good in bar for a whole can
a p^{ty}. remain or must he take judgment. (not supp.)
1 Rand. 282. Laves 136. 1 Selw. 4. 2 B & P. 427. 4 Co. 62.

He must take judgment by nil dicit "I conceive.
4 Co. 62. 303. 1 Rand. 28. for this the mat-
ter might have constituted a good answer to a
whole, yet this is actually no answer but to
a part. e.g. Plover for 10 horses plea as to
5 if judgment, not guilty or licence & no reply as
to 5 other & w^d. remain unsettled & thus a judgment
w^d. not settle a cause.

No decln. for assault & battery & mayhem, & no
answer to a mayhem 2 B. & P. 427. The Ct.
held yt. a p^{ty}. might remain, which stands
alone.

That plea however was incongruous - The two
ends were inconsistent & unlike.

The law is differently laid down in books, but
I conceive it makes no diff. whether this is in
law an answer to a whole or part only when it
is pleaded to part only. tho. if a plea begin
thus, son assault demyner, it expressly answers a whole
a p^{ty}. may remain specially for its inconsistency.
2 B. & P. 427. Laves 136.

These rules do not require a deft. expressly
to answer such parts of a decln. as are not
material or of a part of action e.g. matters
of inducement, & aggravation need not be answered 1 Rand. 28.

for a plea wh. answers & gist of & action covers
all matters of aggravation &c. (e.g.) In trespass
for entering & breaking Jtts. house & expell-
ing him therefrom or beating him, a plea
wh. justifies & entering & breaking is suff. an-
swer to & decln. (i.e.) it will on demurrer de-
feat & action is & pleading go no further, &
will at all events defeat it in & plea is
destroyed by & replication; for & expulsion is
only aggravation.

What is the condition of & question, if D. had
a right to break & enter? How is & Jtts. then
to obtain reparation for & beating & expulsion?
i.e. & plea is to answer by novel assignment, & it,
in his replication, when & entry is lawful, & the
expelling &c. tortious, as in this case it is sup-
posed to be. 3 J.R. 292. 1 V.R. 478. 530. 1 Saunders
vide 4 Co. 62. Loez 130. 1 H.B. 355. 2 Wils. 20.

What is a novel assignment? Vide 3 B.L. 311. 1 Saunders
5 Bae. 213. Loez 70. 27. 100. 230.

It consists in alleging with all ne-
cessary circumstances in & replication (in an answer
even to an evasive plea) what is alleged in &
decln. genly, or, in stating as a substantiated
basis or grounds of claim, what upon & face of
& decln. appears to be matter of aggravation, (as
above) or in stating as a cause of action a trans-
action distinct from pt. wh. & plea states. 1 Saunders 299
a.n.b.

Either of these different ^{statements} in replication, may con-
stitute a novel assignment. (e.g.) decln. in trespass,
plea license at such a time. Replication stating
a trespass of some kind with a diff. time.

Again declr. for an escape, plea recapture in fresh
suit, Replication, voluntary escape. 2 T.R. 125.

When a plea makes a novel assignment. the deft.
may plead again in bar not guilty. To a novel
assignment. a deft. may say to a declr. e.g., genl. if
see 4 Co. Lawes 163. 1 Lunde. 299. 3 East 294.

(A novel assignment, is in effect a supplemental declaration. S.C.)
A novel assignment, concludes with an avermt. yt a 81.
trespass or wrongs described in it are diff't. from
those mentioned in a plea, otherwise a new as-
signmt. is unnecessary, for if they are not diff't.
from a former, they stand justified in law by
a plea already made. Lawes 164. 246. 1 Lunde.
299.

This avermt. can't be distinctly traversed. If it's
not true a deft. shd. plead "not guilty."

Lawes 291. 1 Lunde. 299.

And this involves a denial of a avermt. it being
a denial yt. a deft. is guilty of a wrong diff't. from
yt. admitted & avowed in a plea in bar.

For a form of a novel assignment.
see Chit. Pldgs. art. Novel assignment.

General Pleading.

It was anciently necessary for a deft. to set forth spe-
cially all particulars however numerous of a de-
fence consisting of special matter of avoidance. Co. L. 33.
8 Co. 133. 4 Bac. 90. But now genl. pleading is
allowed to prevent prolixity e.g. when 3 particular
facts, if especially set forth, would (to use Lord Coke's
language) tend to incontinentia, the deft. may plead genlly.

This however is only an exception to a genl. rule.

Two examples will illustrate 3 genl. rule & Exception -
An executor covenants to pay all 3 legacies in
4 with Testator's will, in pleading performance he
is not allowed to plead generally for it is pre-
sumed 4t. 3 legacies in a will can't be num-
erous. He must state each legacy specially,
& 4t. he has pd. them & 4t. they are all the
legacies made in 3 will.

On 3 other hand - Suppose a Mgt. gives
a bond to discharge all his duties, now he
need not plead specially 3 performance of
each diff't. duty - for 4t. wd. be morally im-
possible. He is allowed to plead generally 3t
he has performed all his duties faithfully.

Again if one is bound to performance of cove-
the performance of wh. must consist of a great variety
of facts, he may plead performance genlly. 4 Bac. 91.
Cro. E. 9. 74. 416. 1 Lev. 215. 51. Co. Lit. 503. 2. 256.
(viz. "Covt. Broken") Cro. E. 575. Lawes 60. 1 Saund. 117. n. 1. 25
410. n. 4. 12 R. 573. The rule is there well ex-
posed by J. Buller.

But this can't be done where some
of 3 cove- are negative, for negative ones can't
be performed. as to those he must plead 4t
he has not done 3 acts covenanted against,
see "Covt. Broken" Cro. E. 503. Cro. E. 571. 4 Bac. 91.
5. Com. 236. Esp. 303. i.e. must plead negatively instead of affly.

82.

On this case if deft. pleads performance ad-
vantage can be taken of it only by special re-
mover. Cro. E. 232. 5 Com. 82.

The deft. need not allege more in his plea than
what amounts to a sufficient answer to 3 claim.
Le. 32. 400. 2 Wils. 100. 1 Saund. 295. He need
not therefore negative by anticipation possible

answers to his plea. 2 Wils. 100.

All pleading on either side must be consistent with itself. Hence a repugnancy in a material point vitiates every plea. Hence, if in a point not material, it is then treated as surplusage. A formal defect can't be taken advantage of except by a special demurrer.

3 East 333. 4 Bac. 4th Ed. L. 303. Com. D. 9.

Laves 63. 170. Halk. 325. 1 Wils. 98.

Repugnancy of date in a record is no error after verdict. It is not of substance of record. 2 East 335. 9. see Howe & Eschm. in proha sub. & the rule rejects.

Where a deft. justifies under a writ warrant, or any other process, he must set it forth specially alleging that he acted by a certain writ &c. is not sufft.

1 Haud. 298. in i. r. 402. in 1. Co. L. 283. 3 Mod. 137. 4ib. 378. Halk. 178. Com. Pl. 317. For a matter of law must be specially shown to the Ct. Hobt. 27. 295. 4 Bac. 50. see Court. Broken.

It is D. by Ld. & Mansfield that actionem non goes to every thing case to a time of pleading not to a commencement of action. Doug. 12. 108.

This is not however true in all cases. Laves 178. 3 D. R. 186. e.g. Plea of set off. Coop. 590 (in precedent of 40. plea, for a plea must aver that a plea was made to a deft. before & at a time of the commencement of a suit. 3 D. R. 186. 2 Ch. Pl. 40. 443.

"Non solut" may be pleaded instead of actionem non, when a plea shows there never was a cause of action. Hence when it admits there once was a cause

of action. Lawes 139. &c. Halk. 536. This must be
because if former is construed as denying any
original cause of action or liability & latter as
denying any existg. cause of action or liability or
remedy. Nota when aided by replication.
See Conn. Plag. 2.7.

Traverse.

A Traverse, in the language of plig. is a
denial of some particular point, fact or
factg, alleged in a plig. by another party, &
always tenars an issue - It may be taken
to any part of a plig. & Bac. §7. Co. L. 282.
Nelson. 195.

When a traverse is preceded by special mat-
ter by way of inducement. it is called by Lawes
a special traverse Lawes 21. 42. 116. 121. 149. See. Does
not extend to it decide its character?

When preceded by an inducement. it is called
a technical traverse, but it is not necessarily
a special one. It is somewhat surprising
that so accurate a writer shd. have erred as to
its genl. & special traverse. It may compound of
both technical & special.

When a traverse taken on one side denies a whole
wh. is alleged on the other it is called a genl. tra-
verse. If it is taken on part only of what
is alleged it is a special traverse.

It is sometimes sd. in books that a traverse
closes an issue & Bac. §7. but this as a genl. prop-
osition is incorrect, tho' as an exception to a genl.
rule it is sometimes true. The issue is closed

is triable by a jury by concluding to 3 country. It is
joined by 3 opposite parties adding 3 similiter (at
ch. post)

A technical traverse with 3 words "absque hoc" concludes
regularly with a verification & if special, it always
does, 3 Mod. 203. 4 Bac. 67. 6 Co. 24. 3 Com. 109. 11 Mod. 871.
1 Burr. 321. Doug. 412. Laves 121. 1 Haurd. 108. 5 B. n. 3.
in this case it does not close 3 issue e.g. 94. alleges
in his plea y.t. J. H. did seized in fee & inducing
his title from him. The other says y.t. he did
seized in fee &c. & devised to him, then 3 former
party says he did seized "in tail" "absque hoc" that he
did seized in fee" with a verification, then taken in
this form it only tender an issue.

The words "absque hoc" are only technical words
of denial, but they are not indispensable "et non"
are sufficient. Laves 119. 1 Haurd. 22.

We are told in 3 books y.t. a genl. traverse
may conclude in many cases with a verification or
to 3 country. I conceive it ought to conclude to
3 country always. e.g. "De injuria mea, propter absque
tali causa" 4 Bac. 67. 1 Haurd. 108. 5 B. n. 3. 2 N.R. 363.

1 Burr. 317. Doug. 90. 412. Falk. 11. 7. Mod. 105. 2 N.R.
439. Bro. C. 104. 107. 3 Com. 98. 8 Co. 60. 7. 1 B. & D. 76.

In these rules 3 words "avout" & "verification" are synonymous.

Such a traverse can't be ill as immaterial
because it denies all y.t. is alleged on 3 other
side, & it can't be necessary or proper for 3 adverse
party to answer with special matter for it tender
an issue wh. can't be refused by 3 other party,
since it extends to all that is alleged.

That absque tali causa extends to all that is
alleged by 3 other side see Laves 152. n. 4. 8 Co. 67.

Under what circumstance a genl. traverse may conclude with a verification (2 J.R. 443 or Bur. 1022. 1 Saund. 133. a. b.) no lawyer has ever attempted to point out, tho' justice Buller 2 J.R. 443. has sh. that under certain circumstances it was allowed.

The conclusion with a verification in this place Saund. 133. a. b. Laves 121. is vindicated only by precedents sh. originated in a mistake, for how can it be proper to conclude with an avermt. in any case when all 7 allegations on 3 other side are denied & issue tendered upon them? The opposite party can't possibly make a special answer & he is not precluded by the conclusion from removing if he chooses to do it.

The genl. replication *de injuria sua propria absque tali causa* is appropriately adapted to answer matter of excuse, Laves 154. b. tho' it is genl. a good answer to a justification consisting merely of fact - Laves 155. & Co. 67. & not containing matter of record, right title, or interest, all wh. are matters of law. Laves 155. & Co. 67.

Com. 2. Pl. 2. 20.

For as to these, a genl. traverse is altogether inappropriate, as it does not separate mere fact from 7 matter of record &c. but denies both with distinction. Laves 154.

"But tho' 7 replication "*de injuria &c.*" concluding with 7 genl. traverse "*absque tali causa*" is not proper when part of 7 plea consists of matter of record &c. ~~However~~. But even in such a case 7 ptty. may reply "*de injuria &c.*" concluding with 7 special. traverse of any one material fact or point in 7 plea by itself; as 7 record &c. for he thus avoids 7 inappropriateness of 7 genl. traverse *absque*

title' causa. Laves 154. & Co. 67. by separating the mat-
ter of mere fact, from a matter of record &c.

Whereas, *absque tali causa* traverses all that
is alleged on the other side (Laves 152) Thus to as-
sault & battery & wounding of a deft. justified under
a writ or warrant & alleged resistance by a plff.
& a plff. replies "*de injuria mea proprio absque*
tali causa", he traverses both the writ & resistance
sh. is improper. & it traverses if either wd. be sufft.
but the genl. traverse wd. put matter of record in
issue to a jury as well as matters of fact.

The plff. shd. ergo traverse the one or the other
by a distinct special traverse sh. wd. refer the
matter of law to a Ct., or a matter of fact to
a jury (Laves 154) But the genl. traverse
blends them.

And "*de injuria*" may be replied in its genl.
form to a plea alleging matter of record title
& when such matter is alleged by way of induc-
ent. only. Laves 150. Com. D. plff. 3. 20. Bur. 322.
& Co. 67 a. for then it is not distinctly travers-
able - not parcel of the issue.

If technical traverse as I have obser- 85.
ved, always ~~traverse~~ preceded by matter of
inducement. & differs from a positive denial (*i.e. "absque*
hoc") by a common negative not only in diction, but
genly. in conclusion. The latter is a more proper
mode of denial, when the party tendering the issue has
no occasion to introduce new matter against it (Laves
203. a. b. & Clarend. 205. a. & N.R. 264. m. e.g. suppose to
an action on contract a deft. pleads *usury*, there are
two modes of traversing, - first, *Replication*, a good &
lawful mode of traversing, consideration, *absque hoc*
pt. it was corruptly agreed &c. with a verification.

4. Bac. 67. 77. 3. Bur. 1422. La. Rd. 98. 2 T.R. 439.
2 Uta. 871. 1 Bur. 321. Lawes 45. 49. 116. 2 N.R. 384.
2. 1 Haund. 203. a. b. 103. b. 220. 206. a. 207. a.

Second, It was not corruptly agreed & concluding to
y country. This forms a complete issue, & itself
sometimes called an issue, as distinguished from a
traverse, technically so called. Lawes 117.

This latter mode of traversing always forms
a complete issue, & must always conclude to the
country. Qu. whether a ~~wrong~~ conclusion in these
cases is ill on genl. demurrer? it is according
to La. Rd. 94. Cro. C. 117. 184. - & to Vent. 240 it is
doubtful.

In Rd. - to debt on bond conditioned to pay cer-
tain sum, & deft. pleaded yt. he had pd. all,
& plff. replied yt. he had not pd. all with a
verification. It was holden ill on genl. demurrer.
It seems it was ill on genl. demurrer before Stat.
4. & 5. Anne. 39 Mod. 203. 2 Haund. 190. n. 5
scus since yt. Stat. It is ill under yt. Stat.
only in form & can be reached only on special
demurrer. 1 Haund. 103. b. 285. n. 5. 5 Mod. 203.

When an allegation on one side is expressly denied
- on y other in common negative language & super-
addition of a technical traverse is unnecessary -
necess. ergo improper & demurrable, for there is a
complete issue witht. this addition.

86. Scus y parties might answer ad infin-
itum. e.g. y plff. avers performance of a conditional
precedent, & deft. directly denies by saying yt. y plff
did not &c. There is a complete issue. Super-adding
a traverse of performance by an "allege hoc" is improper
& Bac. 67. Lawes 117. 2 Uta. 871. Cro. C. 755. 1 Vent. 101.

Lat. Rd. 98. 2 Sand. 188.

Note. on y subject of conclusion of pleas. y word aver-
ment. is used in y same sense with y word verification.
It means y allegation of y party, yt. he is ready to
verify.

When is a Traverse necessary?

Genl. Rule. When one party alleges new matter
wh. is inconsistent with any of y antecedent traversa-
ble allegations in wh. if found either way upon
issue joined, sh. be denied on y other side, but wh.
does not form an issue, — A traverse of these all-
egations is not only proper but necessary. otherwise
y parties might plead ad infinitum witht. forming
an issue - e.g. deft. plead yt. he's co. deft. at y date of
y writ; then if y deft. replies yt. he was alive
altho. y plea is directly repugnant to y other yet
it does not form an issue. Hence a traverse of
his death with an "absque hoc" or "et non" is
necessary (i.e.) traverse that he was alive, absque hoc
yt. he was dead.

De deft. alleges J. S. died seized in fee, plff. re-
plies yt. he died seized in tail. Here he must
traverse yt. he died seized in (tail) fee. 4 Bac. 57. 70.
Laves 50. 117. 1 Wils. 253. Holt. 103. 1 Sand. 22. n. 2.
2 id. 207. e. n. 4. 209. n. 8. Cro. E. 30. 3 B. & K. 310. 1 Linn. 101.
1 Kent. 213. 2 Mod. 68.

The new matter wh. precedes y traverse is called
y inducement. To it. Laves 117.

To y genl. Rule there is one exception. When in
answer to a negative allegation it is necessary for
y party to set forth affirmative matter specially

to make out his case or defence, he can't conclude with a traverse of his negative allegation, tho. this new matter is inconsistent with it. see D.B. & P. 362.

40 M. 233. 6 East 556.7.

Thus in Debt on arbitration, if Deft. pleads "no award" & P. may reply "an award" setting it forth & alleging a breach, but he does not traverse & plea tho. his allegations are inconsistent with it (Ch. Pl. 187. Laves 156. 6 East 556.6. Hobt. 233) for he must plead a new matter specially to make out his own cause of action & conclude with a verification, & of course leave it open to be answered by Deft.

This exception is in genere.

Why we may ask does not a rule hold in this case? I answer there is no cause of action witht. an award if alleged. It is new matter & consequently a plea must be left open.

Mr. Laves has repeated a proposition of Ld. Hobts. yt. a special traverse witht. proper inducement. do. include a "negative pregnant" Laves 118. 120. see sup. 137 page. —

But this rule is by no means universal. It holds in genl. only, when a traverse, taken by itself, includes circumstances or particulars yt. are not material. 2 Laves. 188. 180. 183. b. Willes 318.

Sig. 220. 15. 90. 312. Story 24. Com. Pl. G. 20. 3 Mod. 16. Hobt. 321. in wh. an inducement is necessary to limit its extent & application. Laves 121.

The rule is really incorrect — It wd. lead a party traversing to employ an inducement, of course whether necessary or not. The truth is, there is no such genl. rule as yt. stated by Mr. Laves, e.g. in an action of battery, & a molliter manus &c. Replication outrageous & aue inducement is necessary.

"I converse" Gloria J. L. is dead, Repln. "not dead" no
inducement. is necessary.

But all y^t. is necessary for y^e pleasure to be
is first to ascertain whether y^e traverse with
an inducement. w^o. be a "negative pregnant" If it
would be, it is necessary to proceed it with an induc-
ment. Pltiff. an inducement. is secret language,
e.g. Pltiff. "now landlord of J. D. who is still alive
&c. Pltiff. may reply y^t. he is not alive (see) with
inducement. The Pleas of title by devise from J. D.
alleging y^t he died seized in fee - Reply, y^t he
did not die seized in fee is good.

When a party confesses & avoids, by new matter,
& adverse allegation, a traverse is improper, for
what he alleges is not inconsistent with & adverse
allegations. Indeed a traverse w^{ch} is inconsistent with
his own pleading, for he certainly cannot traverse
or deny what he has already confessed. (e.g.) In
an action on contract & Def^t. pleads infancy,
& Pl^t. replies & t. he made a promise to fulfil
after full age. Then he can't traverse, having
made a virtual confession. & there is a repugnancy
in his own plea.

The plea of release - Reple. by writ of per
 fraudem &c. however wd. be improper. - 4 Bac. 70.

Bro. C. 381. Yelo. 151. Bro. J. 221. 22. Mod. 168.

1 Savant 207. n. 5. 209. n. 1. Savant 22. n. 5 Bl. 909. 1 Wks 253.

The Repln. in these cases as it contains new matter must conclude with a verification withl. or traverse.

393 bk. 509. Lycop 118. 7 Wilson 253. 1 Hand. 22. n.

2 do. 5. 2-3. 707. c. n 4. last. 166.

However in 3 last case it ill vs. special demand

only. 1 Found. 21. n. 2. 2 of C. n. 4. 6 Co. 25 b. Co. 151.
Pro. J. 221. Golv. 151. Carth. 166.

Traverse preceded by inducement, is but a conclusion of fact from y inducement, when both go to y same point (e.g.) If J. V. did seized in tail "absque hoc" that he did seized in fee.

88. Where traverse with a verification is tendered, the issue is formed by y opposite party affirming over what is traversed & concluding to y contrary 4 Bac. 67. 8. Talk. 4. Co. Lit. 126. a. Lavey 139.
This affirming over is a repetition of former allegations.

The issue joined on an "absque hoc" ought to have an affirmative after it. Not-y words after it mean after, "absque hoc" not after y issue.

The meaning simply is, y^t. a negative allegation can't be traversed with an "absque hoc". It must be traversed with a direct affirmation. (Law. 121.) as otherwise wd. consist of a double negation (e.g.) deft. pleads y^t. co. deft. was not living at y date & y vet. I do & pth. co. not bleed y^t. he was living, "absque hoc" y^t. he was not living. He must conclude with a direct affirmation; for y "absque hoc" is precisely equivalent to saying y^t he was not living, & 3 rules of pleading will not admit of such complicated language. 1 Whit. Pl. 587. 6 East. 566. 7. 4 Bac. 68. n. Co. L. 125. n.

1 Found. 103. b. 4 Bac. 70. 2 Mod. 60.

Again, plea "release" Repln. "not voluntary &c." but by duress. Rejoined with an "absque hoc" y^t. it was not voluntary &c. wh. is, in common language "is not, not voluntary" traversed in form because it contains two negatives.

The plea 4th. & 5th. did not give 3rd. notice &c. - Replication *aliquo hoc &c.* (with) the instance of a negative argument is here given wh. was omitted in the 'proper place two pages or rather than back.

The 5th. in an action on contract for lease money, 5th says 7th. it was earnestly agreed to take 10th. st. If 7th & 7th 1/2. replies 4th. it was not agreed to take 10th. st. This implies a negative argument 4th. it was earnestly agreed to take 9th. st.

The omission of a traverse where necessary is to be matter of substance. 4 Bacc. 76. 2. 50. 1 Leon. 43. 9th Co. L. it was so held by Stat. 4 & 5 Anne it is matter of form only 1 Shenn. 103. 6.

If 5th 5th. in traversing 3rd 7th 1/2. title shows in inducement. a defective one in himself (i.e., a defective refusal his plea is bad Laves 118. Com. 119. 9. 20. Bro. C. 536.

Genl. Rule - There can't be a traverse upon a traverse, when 3rd point is material. A traverse upon a traverse, is a subseql. traverse going to 3rd same point as is embraced in a preceding traverse on 3rd other side, - This is to bring the case to an issue as soon as the pleadings are ripe, for an issue.

By this rule is meant 4th. where one party has tendered a material traverse, 5th other must join in it, & can't leave it & tender another upon 7th inducement. to 3rd same point (i.e.) to 3rd same ground or claim or defence 3 Bacc. 78. 87. Co. L. 282. Hob. 164.

Butt. 79. see particularly for a full illustration 5 Com. 119. Com. 8. 7th. 9. 17. 2 Stat. 183. 1 H. 13. 403. 2d. Ed. 121. 2d. 222. Co. L. 282.

If it were otherwise they might go on infin 89.

ately - (e.g.) Plt. claiming from J. S. pleads that J. S. was seized in fee, & def. replies that he was seized in tail "absque hoc" yt. he was seized in fee. J. S. Plt. must join in this issue & can't traverse & seize in tail. If we both traverse go to 3 same point J. S. tiller, both embracing same question whether J. S. died seized or not, in fee.

But a traverse after a traverse is good, even tho' 3 first is material. 4 Bac. 75. Hobt. 104. Co. L. 282. b. 5 Com. 120. Poph. 101. Com. D. Pl. G. 18.

What is 3 diff. between a traverse upon a traverse & a traverse after a traverse? 3 traverse after a traverse is ^{one} wh. does not go to the same point (i.e. 3 same fact or ground of defence) as is embraced by 3 prior traverse on 3 opposite side, but tender an issue on a diff. point. Hobt. 104. 1 Ch. Pl. 535. 2 do. 265.

Com. D. Pl. a. 1. (e.g.) 3t brings an action against B. for entering upon his lands, B. pleads yt. he entered upon his land on 3 first of July, having a licence from J. S. & concludes with an "absque hoc" yt. he did commit a trespass on any day after or before.

J. S. Plt. may do one of two things, either traverse 3 licence or join in 3 first traverse. Not all-eging yt. 3 trespass justified, & yt. complained of, are 3 same is sufft. tho' on a diff. day.

1 Lounds. 298. 22. Co. L. 228. For 3 distinctions & explanations see Hobt. 104.

Com. D. Plt. G. 124. 1 Ch. Pl. 535. 2 do. 265.

J. S. this traverse upon 3 licence, is not a traverse upon a traverse, but a traverse after a

traverse, for it goes to a diff't. point.

Again, in an action of trespass & deft. pleads a release on 1st of June. This is not enough. He must support an "allege hoc" &c. he committed trespass on a subsequent day. If he pleads he is at liberty either to join in & issue tendered or to traverse & release. If he do not traverse & release, he might lose his case by false inducement.

So Trespass deft. pleads default to himself on 1st of Aug. & traverses a trespass on any previous day. Here & plff. may traverse & default.

This, however, is not a best mode of pleading. The more simple & better way is to plead (in such a case) specially only, as the part justified or avoided, & & genl. issue as to & rep'due, & put himself upon his country, instead of concluding his special matter with a traverse (e.g.) In Trespass "quare clausum fregit". Plea as to any trespass since such a day "not guilty"; as to any before release. If Taver, the day bel. in & justification is & same as bel. in & declm. no traverse is necessary, or proper; the trespass alleged & &c. justified being prima facie & same. Ch. Pl. 35.

There can't as has been observed be a traverse upon a traverse when & former is material, but there may be when & former is immaterial.

This traverse upon an immaterial traverse may be treated as a nullity, & a traverse tendered on an inducement. 4. Bac. 25. Hobt. 104. 5. Com. 120. H. & B. 370. 406. Stra. 119. Co. L. 28. 26. Co. E. 99.

Co. th. 116. 1 Land. 20. 22. m. 4 T. R. 350. 6 Co. 23.
(e.g.) trespass for cutting & selling trees, deft.
pleads special matter, as y^t. he cut for the
ptps. use & by his license, & traverses the
selling. Abbott. 104.

Here y^e deft. traverses, fact
of selling them, but it is an immaterial tra-
verse & 3 p^{ts} may pass it over & traverse
y^e inducement. or y^e license.

In this case as y^e deft. does not justify for
any particular day, he does not traverse as to
any other time, & e.g. y^e trespass justified is
taken to be y^e same as that complained of,
hence y^e 2^d traverse is a traverse upon a
traverse, or y^e p^{ts} may demur specially,
for y^e materiality of y^e first traverse. 1 Land. 21. m.
Co. J. 221. N. p. 131.

90. But there is one flat exception to y^e genl.
rule (viz.) in y^e case of false foreign pleas -
e.g. when in trespass for battery. laid in the
county of y^t. deft. pleads a local justification
in y^e county of B. as y^e authority of a sh^{ff}.
of y^t. county & a right to exempt &c. with an
absque hoc y^t. he (purportedly) committed it in y^t.

Here y^e justification being local, y^e p^{ts} may
leave y^e traverse tho' it includes what is mater-
ial viz. y^e trespass alleged & traverse y^e justi-
fication. For supposing such a justification to be
false & y^e p^{ts} do not mean y^e first traverse &
take issue upon y^e justification, it must follow
y^t. he must be deprived of choosing his venue in
transitory actions, or be defeated by y^e false plead-
ing of y^e deft. Thus in y^e case stated, suppose
y^t. y^e trespass was committed in B. & not in y^t.
still y^e p^{ts} may have a right to recover & sue in y^t.

in preclusion from denying & payt. & this grand-
ining for 4t. part.

If 4 deft. do. take advantage of 4 payt. & so
he must plead payt. of 4t. sum & for 3 repone
nil select.

In these cases you perceive 4 whole pleads go-
to one point.

On 4 other hand where 4 traverse & its inducement,
go to diff. points joining in 4 traverse admits,
inducement. when they go to one & same point, &
are properly adapted to each other joining in the
traverse they not admit 4 inducement. because in
such case 4 traverse is but a consequence in point
of fact from 4 inducement. They if 4 whole debt
was but \$50 & allegation of payt. may be
false.

Suppose it false yet if 4 traverse were good, the
4t. must win in it, & be defeated by a false plea
as in do. not contest 4 alleged payt. in evidence.

Or suppose 4 allegation of payt. & traverse both
false (i.e.) suppose no payt. & 4 whole debt a-
bove \$50. in this case if 4 4t. joins in the
traverse, as he must if it is good, he can't in evi-
dence contest 4 false allegation of payt. as above, & if
he might & the traverse of alleged payt. he do,
not under 4t. traverse go into 4 paying 4t. & not
over more than \$50.

If 4 plea were good in do. in no possible way an-
swer with prejudice, tho' it were entirely false,
4 plea must ergo be ill.

It is in 4 case for instructing 3 highly deft. just
as up to the obsequ hoc. 4t. he has instructed

3. The plea is bad. He who pleads 3 genl. issue as to one, not justification.

In these cases if a traverse were good 3 plff. wd. be obliged to join in it & wd. thus be precluded from answering as to part covered by a inducement.

The order to be clearly understood, & it may be clearly remembered. I repeat - When a traverse & its inducement go to diff. points, joining in the traverse admits 3 inducement. ex. ante. & a traverse after a traverse. Still if they go to 3 same point & are adapted to each other.

Indeed when 3 inducement & traverse are adapted to each other, properly & go to 3 same point joining in 3 latter implies a negative of 3 former, for 3 traverse is but a conclusion from 3 inducement.

For 3 purpose of avoiding 3 facts alleged in 3 inducement. a protestation is sometimes used 4 Bac. 68. n. but can answer no purpose in the case in wh. it is used; for 3 subject of 3 protestation is not "in esse".

Indeed 3 protestation itself is no part of 3 proceedings (Lawes 141) & in this case principally I shd. suppose a protestation to be wholly unnecessary since by 3 supposition 3 allegation to wh. it is taken shd. not be removed by pleading, & ergo no answer to 3 protestation is necessary.

13 Lawes 143. Com. D. Pl. n. Bac. 68) & indeed admits of no answer. 4 Bac. 73 n.

3 Protestation.

As defined by Lee. Coke it is "an exclusion of a

conclusion" 3 Bk. 311. Co. L. 126. first so but not a definition.

But a party tendering a traverse admits
in course all traversable allegation wh. he does
not traverse, for he is at liberty to say what
he pleases. 3 Burr. 2. 78. n. Valt. 91. 1 Wils. 338.

For him who a protestation may answer
a very valuable purpose, for he may avoid
or exclude any such conclusion or admission. & in this
case a protestation may be useful & important
for a purpose of excluding an estoppel wh. a
 allegation not traversed might otherwise constitute.

But a protestation does not oblige a other par-
ty to prove a allegations protested against, but
as to a principal case admits them.

Lives. 141. 2 T.R. 441. Burr. 1022.

It merely prevents these allegations on a record
from being void. in any other case against the
party protesting; & a party to wh. a protestation
extends. 3 Burr. 25. Co. L. 126. 2 Burr. 1023.

5 Com. 120. 5 Gild. 136. Lit. 192. sec. 1. 3 Bk. 311.

Lives 141.3.

The next, when he protests against a allegations
says in common language, - now there are two or
three of these allegations wh. I have no objection to
admit in order to decide a present case, but I do
not choose to have this admission to appear on a
record so as to injure me in any future case.

a protestation may be of use either to a party
traversing or to a party joined in a traverse.
This is a only method of denying a allegations not
put in issue. Lives 114. Plowd. 267. b.

A repugnant protestation does not vitiate a plea
for in strictness it is not, but as a plea, Lives 142.

Comm. D. Pl. m. 22. (8 in genl. a protestation does not
avail of party protesting in any way, if the issue is
found against him. Lawes 142. This rule is
found in no other authorities & is inconsistent

But matters wh. might be excluded by protest-
ation may if not so excluded conclude & traverse
party in genuine controversies tho- the issue is found
for him. 4 Bac. 25. n. Lawes 141. Lit. 192.) for it ap-
pears by a record to wh. he is party:

It is a rule yt. a traverse can be properly taken
only on a material point (i.e.) one decisive of
the cause) Lawes 118. 1 Roll 235. 2 Co. 24. a. Leath. 217,
2 Harnd. 28. Comb. 321.

If however the adverse party will remove to it as
immaterial his removal must, by Stat. 27 Eliz. c. 5.
& 3 Anne c. 18 be special. 1 Harnd. 14 n. 21 n. 20. 207. b.
319. u. n. 2 the. 694. for St. 27 Eliz. 4 Bac. 155. for
3 Anne see 1 Bac. 95. (contra Stat. 27. at C.L. an
immaterial traverse was ill on genl. demurrer.
Oylo. 195. 2 Harnd. 207. b.

And yet if the party to whom the traverse is tend-
ered joins in an immaterial traverse & a verdict
be found vs. him, judgment will regularly be arres-
ted & a rejoinder advised. 1 Harnd. 228. n. 1. 20.
319 u. n. b. Leath. 371. Cro. J. 334. 385. Hall. 396.

Tho' as the case might be a verdict
upon such an issue wd. be good, for in some cas-
es an issue found one way will be decisive of the
right when if found the other, it wd. not.

But these are cases of mere negative argu-
ments. Then a verdict, if for the party hav-
ing, will be good except when the issue is objection-
able only as being a negative argument?

I think not & not always then (e.g.) case of cont.
payable on or before &c.

A traverse can be taken only on an issuable point;
for what is material is not necessarily issuable.
The very object of a traverse is to tender an issue,
hence matter of law, however material, cannot be
traversed. 1 Clarend. 22. n.s. 220. 221. a. 2 H. 13. 182.

(e.g.) In an action of false imprisonment, & deft.
pleads he was a suff. & has a lawful right
as such to arrest & imprison. Here & pth. may
traverse & fact of his being suff. but can't tra-
verse & legality of an arrest by a suff. no genl.
matter of inducement. 4 Bac. 68. 81. Lawes 46. 118.
Cro. E. 109. 201. Com. D. Pl. C. 14. Hard. 70.

11 Co. 8. b. 1 Clarend. 22. n.s. 221. 228. 22. 220. 159
2 Mod. 220. Doug. 159. Latch 111. Talk. 628. 66. 492
Hobbs. 103. 1 H. 13. 370. 403. Cro. J. 221. Wood. 271.
Exceptions Com. D. Pl. J. 14. Cro. E. 201. Bac. 14. 43

Neither can a "per quod" or "virtute cujus" be tra-
versed in a justification. It's when in 3 example
(sup) & deft. pleads yt. he was a suff. & & coun-
ter of D. "virtute cujus" or "per quod" he arrested &
pth. ; Now as before & pth. may traverse the
fact but can't & "virtute cujus" nor & "per quod"
for it is only a conclusion from & fact stated.

1 Clarend. 22. n.s. 228. n.s. 229. 220. 410. 220. 667.
11 Co. 60. 3 L. R. 65. (2 B.R. 226. 2 Nils. 224.

But in such a case & issuing of & writ may be
traversed. 1 ib. auct.

A traverse may be taken on a precise averment
sh. being made becomes material tho. not necessy.
to have been made. 2 Clarend. 206 n. 207 a.
Hobbs. 143. 1 Clarend. 356. Lawes 48. Doug. 530. 2 H. R. 101.
Bristol 22. 110. 110.

A Traverse may be taken on a (single circumstance)
single point only (i.e.) a single ground or claim of
defence, otherwise it will be bad for duplicity.

A Traverse containing more than one point is bad for
duplicity. This one point may however consist of
more than one fact (This subject is well explai-
ained by Ed. Mansfield in 1 B. & P. 80) where how-
ever 3 reports mistated his Lordship, & by that means,
rendering his words almost unintelligible. 1 Burr. 320.1.

I shall enter into 3 subject more fully
when I come to treat of Duplicity. 8 Co. 66. Buller 93.
3 Lev. 40.

When there are two distinct facts either of them
may be traversed as 3 party traversing chooses.
8 Co. 24. b. 1 Will. 338. Com. D. plag. 4. 10.

93.

Nothing but what is alleged or necessarily implied
on 3 one side can be traversed by 3 other; for
it wd. be absurd, & 3 opposite party might
well ask, who has asserted any such thing?

1 Land. 512. n. 4. 206. 2 ib. 10. n. 14. Gluck. 829. b. 8.
plag. 4. 8. 13. Carth. 99. 2 Fint. 79. i.e. g. deft. alleges
factum. Living & slain may then be traversed for
it is necessarily implied in 3 factum. But if,
on 3 contrary 3 plty. shd. traverse something wh.
is consistent with 3 allegation it shd. be bad.

A Traverse improperly taken under this rule, is
ill only on special Demurrer. if 3 party choose
to demur. 3 Bac. 75. Ed. Rd. 208. 1 Land. 512.
n. 4.

Any material point in 3 pleading may be travers-
ed tho' alleged by way of suggestion only, such all-

exceptions being bad, & ergo demurrable, since a traverse may be taken upon them. 2 Chanc. 206. a. n. 212. Com. L. pl. 4. 11. Cro. E. 169. Lavey 48.

Where a plea justifies or confesses & avoids part only of a decl. concluding with a traverse, the traverse must be co-extensive with the residue, i.e. with all of it, is not justified or avoided. e.g. In trespass deft. pleads a license on 3 day alleged in the plea, He must traverse all other days, or else the plff. might prove the trespass to have been committed. Hob. 164. 2 Mod. 68. 4 Esp. 415. BULK. 222. 1 Les. 241.

But in this case if the license be pleaded on 3 day laid in the decl. a traverse as to any other time is not necessary as to any other day, for the decl. is answer both going to the same day, the trespass shall be deemed to have been committed on that day, & if the plff. intends to prove a diff. day he must do so by proof & argument. 5 Bac. 206. 3 Walk. 42. 2 Chanc. 5. 2 Chit. Pl. 542. n. 1 Chanc. 14.

94. In the action of trespass if deft. pleads justification on a diff. day he must allege "quod est videm transgressio" but if on the same day he need not for it shall then be deemed to be the same trespass. (e.g. Trespass Decr. 1st 1826 deft. pleads license on 3rd he must here add quod est videm transgressio & argue hoc est. he was guilty on any other day, but if he pleads license on the 1st it is unnecessary.

A traverse well tendered by one party obliges the other party to join in it if it is inducement, & traverse goes to the same point, & the party to whom it is tendered

tendered can't leave it & take issue on any other point. Hobt. 104.

But if γ inducement. & traverse do not go to the same point there is no such compulsion, e.g. Deft. pleads title from L. Viles by devise, Pltff. replies yt. L. Viles died seized in tail abque hoc yt. he died seized in fee. Then γ Deft. can't traverse γ inducement. for it goes to the same as γ former traverse.

I have had much to say of inducement. In most cases there is no need of inducement. It is in many, nevertheless, indispensable. (e.g.) It is sometimes necessary to prevent a neg. pregnant in wh. case it limits its application, It is sometimes necessary by way of protestation, or rather protestation sometimes takes its place, & when γ traverse & inducement. go to diff. points it is indispensable. e.g. Trespass plea of justification.

Traverse is however sometimes preceded by inducement. with necessity. (e.g.) Deft. pleads yt. his co-deft. is alive, Pltff. replies yt. he is dead abque hoc yt. he is alive. Here the inducement. is unnecessary. for he might have sd. he is not alive.

It is a rule in pldg. yt. γ inducement. to a traverse must contain issuable matter except it be by way of protestation. 2 Leon. 32.

Bro. C. 336. 4 Bac. 68.

This rule has been contested by some on the ground yt. it is not founded in principle. Wh. viz. it not contain issuable matter? If γ traverse & inducement. go to the

same point, & inducement must contain issuable matter, for & traverse is a conclusion from it, consequently if there be not issuable matter in & inducement, there can't be in & traverse.

If on & contrary they go to diff't. points, then is & inducement traversable, wh. can't be unless it contain issuable matter. No y't. in either case there are most obvious & conclusive reasons why it contain issuable matter.

It is frequently & indeed genly. & case y't. a traverse follows & terms of & allegation traversed, but a traverse in this form is not always correct, for it may sometimes amt. to a negative pregnant, in wh. case it shd. not follow & terms of & allegation, or else it shd. be preceded by inducement. e.g. in action on deed deft. pleads release since & date of & writ for this implies a release before, but he may reply no release in manner & form as & deft. hath alleged.

Is in & Assumpsit - deft. pleads tender in the county of M. here p'ty. must not reply y't. there was no tender in y't. county, but say y't. he did not tender in manner & form.

In short where & traverse wd. involve a negative pregnant by answering & terms of & allegation, those terms shd. be avoided.

2 Mod. 146. Co. L. 126. 2 Land. 318. b. 208.
& Bac. 98. Com. D. Pledg.

In an action for money payable on or before a certain day, & deft. pleads payt. before &

day. & mode of traversing is anonymous. In this case y pld. must traverse not only z payt. before y day, but also payt. at y day & any payt. after, so yt. z pld. is obliged to traverse what z Debt. has not alleged. for in this case if y pld. replied merely yt. there was no payt. before y day, there is an implication, yt. it might have been pd. at y day or some time after; & if so, there was no breach of z contract, & tho. z jury find no payt. before y day, this will not determine y cause.

The pld. also must traverse that it is not alleged, in order to make out a breach of the contract, i.e. it it was not pd. on the day nor before nor after, so yt. he traverses more than is alleged, & is the only case of this kind in 3 L.

There is a difference when y contract is payable at y day. Here z Debt. may plead payt. at y day, & proof of payt. before will support it.

The pld. in this case ought to traverse z payt. "modo et forma". 2 Wils. 150. 173.

4 Bac. 66. Com. D. Pl. G. 1. Laves 120.

A traverse is usually followed by z words "modo et forma", but it is not necessary. yt. it shd. be.

Com. D. Pl. G. 1. Laves 120.

Jdg. pregnant is ill only on special demurrer, & is aided by verdict, it is worthy of great attention to keep clear from making a traverse a negative, pregnant, for if it includes any thing immaterial it will be a negative, pregnant.

Duplicity.

This is a fault in pleading, because it tends to unnecessary confusion, prolixity & em-

barapment, which γ law will not allow. 4 Bac. 114.
Co. L. 304. a. 3 Bk. 311.

I have already shown in what duplicity in γ decln. consists. It consists in unnecessarily joining two or more distinct & independant grounds of action either of γ same or diff't. kinds in support of one right of recovery.

γ plea is double when it consists of two or more distinct & independant matters going to γ same point or ground of claim or defence & which require distinct answers. Co. L. 303. b. 304. a. 3 Bac. 118. (e.g.) in trespass deft. plead justification & release to γ same trespass. This is bad for duplicity; for either if good, wd. have been sufft. - or if the deft. shd. plead infancy & assent to an action or any other plea, one of wh. wd. be sufft. of itself, this wd. be duplicity, for γ law will not allow many pleas when one is sufft.
1 Fount. 356. - 1 Call. 180. 3 do. 142.

Giving diff't. answers however to diff't. parts of γ decln. does not amount to duplicity, for deft. may as to one part plead "gent. issue", & as to γ residue, "release" or any other plea. (e.g.) In an action of trespass for cutting ten trees, as to nine "justification", & as to one γ residue of γ do. ten "not guilty".

Co. Lit. 304. a. 4 Bac. 118. 119. 129.
Lawes 101. 183.

And if there are several defts, each may plead for himself, & plead one defence to the whole, & separate pleas to diff't. parts of γ decln. for if one deft. were obliged to join

with his co-deft. his case might be deplorable,
& his property might be taken from him by
collusion of y co-deft. with y p'ty, since he
might say to y p'ty, "join me with him, &
I will join in no defence wh. can be supported,
& so you may obtain judgment against us, and
I having no property, y burden must fall
upon y other deft. Robt. 67 c. 2. 1140. 610. La. R. 1372.
Esp. D. 414. 15. 19.

This rule is to be taken subject to y following
exception. In action on "contract" there can't
sever unless there be a difft. plea, for in
this case y p'ty can't recover of one witht. both,
(e.g.) In assumpsit against J. & O. B. - J. B. prom-
ised but O. did not, there can be no recovery
of either. Here then, there can be no necessity
of a severance. 3 Esp. 75. 5 Do. 47. 1 Howard.
207. a. b.

Each however has a right to plead a difft. se-
quence from y other ^{e.g. Adult & minor.} 6, Naps. Rep. when it is
ld. down y't. co-deft. can't sever except in tort.

The requisites of a good plea are, y't. it shd.
be simple, single, entire, connected & confined
to a single point, i.e. to a single ground of defence, or
action.

5 Blk. 311.

This point may not consist of a single fact, for
several distinct & connected facts may be necessary to
constitute a defence. e.g. deft. wishes an award of
arbitrators. Here then are several facts to be
stated, y agreement to abide by y award, y appoint-
ment of y arbitrators, their meeting & hearing the
parties &c. all wh. are necessary to constitute one
defence.

Pls of tender, & 4th. must state his making
& tender & refusal of & 1st. & 2^d. he bring the
money into & Court - 1 Brev. 320. 2 B1k. 1028.

4 Brev. 1201.

3 Halk. 142.

For too in pleading probable cause to an action
for "malicious prosecution", all & facts sh. go
to show 4th. there was probable cause, must be
pleaded, & & more numerous & better. Cro. E. 134.
871. 900. Exp. D. 533. 4. & & genl. replication - de
son tort alseque tali causa will ^{show} ^{all} in info,
& where one has been arrested on suspicion all
& facts sh. show there was good cause for arres-
ting & must be set forth. (in act. & 2 Halk. 121)

But in an action for "false imprisonment", if 4th.
pleads one crime for wh. he arrested him he must
confine himself to that one - e.g. 4th. pleads & 4th.
he was sh. of & 4th. counts of 4th. & 4th. & 4th. committed
being bary & also forgers for wh. he arrested him
This is bad for duplicity for either wd.
have been sufft. Exp. D. 538. 6.

When & fact relied upon as a defence is & conse-
quence or effect of some other, both may be pl.
eaded for this is only showing how & fact took
place - (e.g.) Administrator to plead plene admin-
istravit - having no assets for & having no
assets show 4th. he had fully administered.

Plod. 14. 1 Brev. 120. 1 Brev. 2. pl. 2. 2.

99. 4th. counts in & decls. each being single, do not
amit to duplicity, whether for & purpose of
supporting more than one ground of recovery
or one only; for each point to be in support

of a separate right of recovery. (e.g.) 44. sup. B. on the
bonds here are ~~more~~ too counts one in each bond,
& it makes no diff. whether in fact there was
two bonds or only one. This is allowed to enable
3 plff. to adapt his case to 3 state of 3 testimo-
ny. 3 N. K. 298.

So also in an action for money due by promissory
note, there was usually inserted 3 common mon-
ey counts, yet. shew. 3 plff. fail in one, he may
recover in some other.

If on 3 contrary diff. parts of one count re-
quire diff. answers. this amounts to duplicity.
But surplusage never amounts to it, as if 3 def.
pleads 3 defences, one of wh. is not issuable, this
is not double, by reason of 3 rule "utile per inutile
non vitiation". e.g. 3 def. ^{in contract} to lead 3 def. & readiness
to pay at all times before; this is not double,
for 3 readiness to pay is not issuable & surplusage.
1 R. 116. 601. 2 Wils. 376. 1 Viner 115.

4 Bac. 119.

As to this title of duplicity. see Com. 2. Pl. 6. 38.
abatement. 4. action 4. 1 Vent. 365. Cro. 6. 176. 20.
2 T. 198. L. R. 4. 4.

By recurring to reports there are but few cas-
es to be found of duplicity in 3 counts. There
are however some instances of it as where 3 d.
promised B. to deliver him all grain at his brewery,
B. brings an action on 3 promise alleging a breach
& in 3 same count alleging yet. 3 d. for 3 purpose
of fraudulently improving 3 stock, mingled with
3 grain a quantity of ashes wh. rendered it utter-
ly useless. Defence & decree consists in unnecessarily joining in one count
distinct grounds of action of diff. or even similar kinds to establish one right of recovery.
Again in Caset or bond, 3 plff. alleges in 3 rep.

location more than one breach & y condition wh.
is simplicity at C. L. It is not necessary at
C. L. to allege more than one, for one is sufft.
to work a forfeiture of y whole penalty. Com.
D. Ch. C. 23. Cro. C. 176. Comber. 297. 1 Bac. 541.
3 Hall. 108. 2 Wils. 267. 1 Fort. 114. 126. 2 do. 198. 222.

100. But in Court. Breaking y plth. may at C. L.
allege as many breaches as he chooses, for
here y action is not to recover y damages
sustained, so y to recover all y damages, altho
several breaches must be alleged, for he can
prove none y. he does not allege.

Com. D. Ch. C. 23. Cro. C. 176.

1 Bac. 544. in Court. 4 Bac. 131.

And by Stat. he may on penal bond, but here
he recovers not y whole penalty, but only the
damages sustained by y breach, Stat. 4 Cont.
27, 8 Stat. 889 of W. 896. (8 D. R. 126. 359,
2 Blk. R. 1018. 111. 2 Burr. 920. 2 Wils. 277. Cro. C. 257.) has
introduced y same rule in Engd. 1.

The rule of law with respect to simplicity in the
decln. is now as it ever has been, but y deft.
by y 4 & 5 June. may plead as many distinct
pleas to y action as he chooses, but they must
be distinct. (e.g.) in "Assumpsit" deft. may plead
tender, payt. release, & former recovery, for y same
thing, by distinct pleas. Justice is by this means
better attained, for y deft. may sometimes mis-
take y proper defence or be disappointed in y testi-
mony, & consequently fail in one plea when he
might have a good defence, 1 Fort. 318. Cro. C. 20.
Count. Stat. 1818. Com. D. Ch. C. 23. Lawes 27. 8. 4 Bac. 121.

La. Rec. 1099. 2 Bl. 208. 2 P. 3. 219.

You perceive there are several places, each
requiring a distinct answer & one answer can't
be given to y whole.

These stats. do not extend further than to y declar.
of y plff. & y pleas of y Deft. sh. go to y action
& do not reach y subseqt. pleadings of either
party. Com. D. Pl. & 2. 4 Bac. Pl.

If y Deft. plead "incapacity," y plff. can't re-
ply for necessities, & likewise promise to pay
after full age. This wd. be bad for duplicity
etc.

Advantage can be taken of ^{duplicity} ~~it~~ only on special
demurrer, by stat. 27 E. ^{cap. 8.} & is added on genl. dem-
urrer.

When it is said yt it must be by special demur-
rer it is to be understood yt y demurrer must
point out y duplicity & show in what it consists.

Saying merely yt. it is double is not sufft.
"The party demurring must" in y language of
Lord Holt "lay his finger on y very point".

1 Saunders. 337. Com. D. Pl. & 2. 33. E. 4. Falk. 219.
378. 1 Kils. 219. La. R. 333. 298. 1 Leo. 76. 4 Bac. 119.

If however two distinct answers are given on one
side to sh. is alleged on y other & are not demurred
to for their duplicity, y party who shd. have
demurred must answer both distinctly, or else
his rejoinder will be defective since either
will support y plea of y other party.
(e.g.) Deft. pleads "release", plff. replies au-
reft & Saunders, if y Deft. do not demur, he
must make a distinct answer to each, for either
wd. support y plff's allegation.

2 Vent. 272. 4 Bac. 119.

101. The rule requiring answer for duplicity to be special, does not apply to cases where, by joining diff't. counts in 1 same decln. diff't. & incongruous causes of action as distinct and substantive grounds of recovery, (e.g.) assault & trover in 1 same decln. This is not duplicity, but something worse. It is a misjoinder & incurable.

1 Tulk. 10. Ray. 233. 3 Lev. 99. 4 Bac. 11.

1 S. R. 274. 8 Co. 87. Com. b. 233.

As to pleading pleas in abatement. see page

Proport & Cyer.

It is a genl. rule yt, where one party pleads a deed & makes title under it, he must plead it with a proport or make proport in curiam (i.e.) he allege yt he has bot it into Ct. Com. D. vol. C. 3 Bl. abridg. 22. Law. 967.

Fidd. 596.

By making title is here meant yt he claims & derives his title by 1 deed so pleaded, & not, as it is usually understood, merely showing void. or title.

This proport is necessary, yt, 3 other party may have copy of it (i.e.) hear it read to him, & also a copy yt, 3 Ct. may inspect it, for being matter of law, it must be shown to 3 Ct. 6 Co. 28. 10 Co. 93. Hob. 233. Com. D. Pl. 5.

4 Bac. 113.9.

The adverse party is supposed to be unable to plead properly witht. it, & ergo can't be compelled to plead witht. it. But if he does plead witht. it he waives all right to it & can't afterward demand it. Halk. 119, 6 Mod. 283.

4 Bac. 113.

Profect is regularly required of no instrument, except a deed. Hence Profect is never, at C. L. made of a promissory note or bill of exchange. § 3 p. 44. is not bound to make it, for they are not deeds & are not properly instruments, but merely evid. of a promise.

The strict rule of C. L. makes no distinction between a verbal contract & ^{written} one not sealed, & by 7 term instrument if meant, not merely a writing, but a sealed one.

Unsealed writings at C. L. create no debt, they are merely evid. of a partial cont. Ch. on Debt 185. 1 Id. 502. 1 Clark 215.

On promissory notes ergo 7 action is not founded on 7 Note but on 7 promise to pay of wh. 7 note is evid. But a deed is 7 foundation of 7 right of action or defence.

In practice however, 7 Ct. will order a copy to be given to 7 other party before he is obliged to plead, tho' he pled. not demand it.

This is not 7 same as offer. This is merely a copy & not 7 original itself. It is only evid. to 7 existence of 7 original.

In Court. notes not negotiable, & sealed writings containing express cots. are treated as instruments & 7 distinction between sealed & unsealed writings is not made, & one pleaded with Profect.

Where 7 right might have passed without deed tho' actually acquired by deed, 7 party, so acquiring it is not obliged to plead 7 deed, & if

he may not plead it, he must be required to make protest. (e.g.) Lease wh. may be assigned by deed, tho' actually assigned by deed, & party pleading need not allege it was by deed.

On the other hand when a right can not pass otherwise, a party pleading a right must make protest for he must plead a deed (e.g.) Incorporeal right wh. can't pass otherwise, since there can be no livery of seisin.

In this case a party claiming right must plead a deed & also make protest. 6 Co. 38. a. b. Cro. E. 145. 1 Plowd. 9 am. 37 R. 136.

But tho' a right might have passed with a deed yet if he pleads a deed & make title under it, he must make protest (e.g.) assignment of lease as before. 2 Mod. 64. 4 Nov. 110. Cases 97.

I observe then that tho' a party pleads a deed, whether he is obliged to plead it or not, if he does not found his claim on it, he need not make protest, for a deed may be matter of inducement. (e.g.) 9 R. 100. B. you granted in a sale of goods, & pleads sale as made by bill of sale he need not make protest, for it is only inducement, & the action not being founded on a bill of sale but on a fraud. 8 T. R. 573. 10 Co. 92. 8 Co. 38. a. b.

What is a principle of distinction between these cases & a party makes title under a deed? I answer when a party pleads a deed, under wh. no title is made, a deed can't be directly under pleaded by a third party, since it is mere inducement.

The object of oyer is to enable a third party to

answer it, but in this case he can't do it, & eye
having never ed. be of no service.

This rule, however, yet he who pleads a deed
making title under, must make perfect, is not
universal; for a stranger may plead a deed
claiming title under it, witht. perfect, & reason
is, he is not presumed to have it in his
power to produce & deed, (e.g.) Gt. pleads from
A. to B. & justifies under B. as his secret
tenant, & deed being in & possession of B.
& Gt. can't produce it.

Again & A. says J. T. is an actor of Tresp.
Qua. Ch. freq. for entering his close Gt. pleads
a grant from A. to B. by a private way over
& land of A. & justifies under B. now here
he pleads & deed making title under it, &
yet is not compelled to make ^{perfect} for & deed is not
in his power. 10 Co. 96. 1 Inst. 394. 3 Lev. 80
1 Harnd. 9. a. n. & this holds only of those who
come in by operation of Law (i.e.) who acquire
title by operation of law, they not being sup-
posed to have & deed in their power, (e.g.) ten-
ant in dower may plead title by virtue of deed
given to & deceased husband witht. perfect, & deed
being in possn. of & heirs. Co. L. 225. 5 Co. 75.
3 Bac. 110. Jenk. 305.

103.

This last rule again is not universal, for all
who come in by operation of law are not excu-
sed from making perfect.

Ex.
Tenant by & curtesy, pleading title by deed to
his deceased wife, must make perfect, for he
has a right to hold & deed vs. & heirs having
his wife. 10 Co. 96. Co. L. 226. a. 1 Bac. 110.

Privies, to read are obliged to make perfect in all cases, where y party themselves or have been. Co. L. 267. 317. 10 Co. 92. 94. #i.e. those in privy with y party to whom it is given. 4 Mac. 111.

There are diff. kinds of privities wh. will be explained under y head of "evid."

Y^e heir is privy to his ancestor, an Exor. to his testator, & then are other kinds of privity.

But y party pleading record is not obliged to make perfect of y record of y Ct. in wh. he pleads, & this rule holds a fortiori with regard to y records of any other Ct.

Ren. v. 28. 6 Mod. 297. Bul. v. D. 252. 2idd. 259.

Co. L. 225. Ho. of Priv. Stat. & Letters Patent.

The reason is y^t. a record is not private prop^y. but public & no private person has any control of it. he can have nothing but a copy.

(so of letters patent & susp. or l^y.). Damp. 476.

On y contrary a Letter Septemetary must be pleaded with perfect, it not being a record. It is an instr^t. under seal, given to a person by y prerogative Ct. & is y prop^y. of y person, & exce being in his power to produce it he must make perfect. Laves y^e. it is not observed herein that he is required.

If a deed is lost or destroyed by time or casualty, it may be pleaded with perfect, for y perfect is impossible, but he who pleads must shew y loss specifically, & how it happened; & if he does not, y other party is not bound to answer.

5 Co. 74. 6. 10 Co. 31. 10 East. 55. 1 H. 83. 254.

2 H. 83. 263. Peake v. 29. 1 Hils. 16.

2 Attra. 1186.

In such cases relief was anciently sought in chancery, for y deed was supposed to be indispen-

sable, but there is no necessity for it now. Equity is sometimes applied to compel a party who lost it to show how it was lost.

1 Mot. Chanc. 28. 26. 1, 8. R. 1815.

1 Brown. Ch. 218. 2 Hobb. 109.

He too if a deed pleaded by one party is in a person of another, there is no necessity of proof by stating a reason of not making it, for it is not in his power.

But when deed is lost if a party pleading it make proof that ignorance or inadvertence, he must fail, for a other party may demand oyer wh. can't be given, & if it be not given, he is not bound to answer.

By a Stat. if amendments. this is remedied, for by that, on motion to a Ct. he may amend by striking out a defect usual on a party's copy. 1 Plowd. 9. 11. 1 Wils. 16. 3 T.R. 133.

In Court. it is never necessary to make proof for it is held y^t. when by C. L. a party must make proof, a opposite party shall have oyer, whether proof be made or not.

1 Root 356.

Formerly a omission of proof when held necessary. By this rule, was held matter of substance but by Stat. of 16-17 Car. 2^d 485. Ann.

it is still only a special convenience. 1 Bro. J. 32.

Hobb. 301. 2 Co. E. 217. 3 Bac. 113. Hutt. 54 where it was held, omission of proof, was not formally matter of substance

Oyer.

Proof being made a adverse party may demand oyer, or to hear it read & also a copy wh. is intended in a idea of oyer.

3 Bl. 299. Hobb. 217.
Lawes 96. 4 Bac. 113.

But that a deed is pleaded with protest, if it was not necessary, & no title made, oyer cannot be required. for it is only inducement. (e.g.) action for fraud in sale of goods. 1 Bulst. 497. Fidd. 329. 2 Wils. 325. Doug. 476. 1777.

105.

The grant of oyer, where not demandable by law, is no error; but refusal when it is demandable, is error. The reason of this is clear. When oyer is granted, when it ought not to be, & effect produced cannot be undone; & benefit given to the other party cannot be taken from him again, but if denied when demandable, & benefit of it, the other party may be deprived, may yet be given him by making it error. 1 Bulst. 488. 1 Hume. 9. 6 Mod. 28.

In order to take advantage of error, the party must enter a demand of oyer so yet, it may appear on the face of the record, & the party, have an opportunity of answering it & the Ct., to decide upon it.

There is however another mode, the party to whom it is denied may file a bill of exceptions & thus put it on the record. 1 Hume. 9. 6 Bulst. 498. 6 Mod. 28. Lee. 224. 969. 1 Hume. 486.

1 Bac. 325. tit. 154. of excep.

On oyer obtained the party may cause a deed to be entered verbatim on the record & take advantage of any condition not stated by the other party. 3 Bulst. 299. 6 Mod. 28. 1 Bac. 115. Law. 983.

If the Ct. mistake any part of the oyer obtained may serve for variance.

106. If a deed appear insufft. on the face of it, the party may serve, but if from any thing extrinsic, he

may plead it in answer. 12 H. 4. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

If a party, obtaining copy of a deed, recite it falsely, & other party may sign judgment, as for want of a plea (e.g.) action on bond, & if party says copy is incorrect & condition here of facts, may sign judgment, & reason is, & party procuring copy undertakes to recite it as it is, & by not doing so he violates this implied agreement. & thereby forfeits his plea & if party pleading a deed may cause it to be entered in full on a replication by an officer of the Ct. & answer to a plea of a Deft. for variance.

1 H. 4. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Departure.

Departure in pleading is a circulation of a former claim or ground of action or defence for another, distinct from it, & not justifying it.

It is a rule that each party's subject, allegation & pleas shall support & acquiesce in each other, & answer, & rejoinder & replication, & rebuttal & rejoinder &c. & otherwise the parties might by shifting their ground continue ad infinitum. 3 B. & P. 310. Co. L. 202. b. 304. a. 2 H. 4. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

(e.g.) Deft. pleads a feoffment in fee in bar & in his rejoinder avows his title alleging it as derived by an estate tail, here instead of supporting his first plea, he shows that he has no feoffment. in fee. 4 B. & P. 122. b. Co. L. 202. b. 304. a. 2 H. 4. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Also if a matter first offered is pleaded as at Co. L. a subject. plea supporting it by

a particular custom is a departure . . . e.g. action
on Indenture of apprenticeship as at C. L.
i.e. in common form not reciting any custom,
Plea Infancy, Replication custom of London.

This is a departure, for as the custom is not
pleaded in the plea, the action is not as at
C. L. 4 Bac. 123. 1 Lev. 81. 1 Feb. 376. 369,
512.

107. To a plea asserting a right at C. L. is not
justified, ^{or justified} by another showing a Stat. right,
Tidd. 136.

E.g. Trespass for taking beasts, in common form,
i.e. not counting upon a Stat. Plea is tamen
is damage perant, Reple. y. t. & seft. cover
them out of the county, This is a departure,
for coming &c. is not actionable at C. L. but
by Stat. of 7 Hen. 3 & 18 2 Ric. 2.
& the action is by supposition not but by
these Stat. 4 Bac. 123. 3 Lev. 48.

But if one in his plea pleads a Stat.
& the other alleges y. t. it has been repealed, &
former may reply y. t. it is revived, for this
justifies the original ground. 4 Bac. 123.

1 Lev. 121. 81. The action
being founded on the provisions of the Stat.

On Cont. if seft. pleads performance &
the other replies y. t. he has not performed
such an act, a rejoinder y. t. he was ready
to perform it, & the other refuses to accept
performance is a departure.

4 Bac. 123. 5. 5 Com. 99.

Co. Lit. 303. a. 1 Fidd. 10.

To plea infancy, Replication necessary, Re.

joinder a release. This is a departure tho it
wd. have been good in bar. Ultra. 452.

Varying in an immaterial point is not
a departure from wh. is before alleged.

Suppose for example -gt. says B. on ass-
umpsit, declaring on a promise made in 1825.

This variance is immaterial, for time
is an immaterial circumstance in bond
contracts. Lalk. 222. 1 Lev. 143. 10 Mod. 348. Bald. 241. 3.

3d pt. 57. Note, - Macomber vs. Fowler -gt.
of errors, "Assumpsit" on agreement to purchase
of y Bkly. stock of y U.S. - y decln. avers
a tender of y stock of New York - Plea
law of y U.S. requiring all transfers to
be made at y Bank in Philadelphia.
Replication tender at y Bank in Phila-
delphia, & holds no departure, y place
first alleged not being material.

Lalk. 222. 4 Bac. 125. 6 Mod. 115.

When y gravamen is genl. on y decln. & 105.
y deft. pleads an evasive plea, a more
particular statement. of y cause of action
by way of new assignmt. in y replication
is no departure; as in y case of both bar
in this case.

Laves 163. 5. 2 H. 23. 555. 3 Bk. 311. Bul. 17.

Laves 184. 5. 3 Bkly. 20. 1 Chanc. 28. 270.

5. a. b. Mills. 218. 1 Chanc. 299. 6. n. 6.

The pth. may new assign with or withl. taking
issue on y plea. Laves 243. 1 J. R. 479.
630. Story 523. 4.

Departure vitiated y plea on genl. demurrer.

Halk. 221.2. Rayd. 22.94. Sta. 422 Cro. C. 115.
 228. 2 Haud. 84. a. 2 Wils. 96. 1 Ch. Pl. 623. n.
 Com. 2. Pl. 4. 10. 1 Haud. 117.
 Dubitation, whether it shd. not be special,
 1 Ch. Pl. 623. n. 1 Haud. 117. Com. 2. Pl. 4. 10.

But it is aided by verdict, Rayd. 86. 3 Mac.
 125. 1 Ch. Pl. 623. 1 Mac. 117. Fidd. 689. 1 Haud. 117.
 2 Haud. 84. 1 Leo. 110.

This rule presupposes yt. enough appear
 on y. whole record to entitle y. party obtain-
 ing y. verdict to judgment. (i.e.) yt. y. matter
 pleaded by way of departure is sufft.
 to decide y. cause.

But it is not aided on genl. demurrer, for
 y. demurrer does not confess y. facts, they be-
 ing all pleaded.

E. g. Plea "infancy", Replication necessary,
 Rejoinder "release", Issue upon re-
 joinder is found for y. Deft. He shall
 have judgment. Verdict on demurrer to the
 rejoinder. 1 Leo. 110. 1 Hb. 568.

Demurrer.

Demurrer is a denial of y. legal suffy. of
 y. allegations demurred to.

109. It admits such matters of fact alleged
 by y. adverse party as are well pleaded &
 those only. Esp. 626. 5 Bl. 314.
 But denies their sufficiency in law & thus
 refers y. question to law arising upon them

to a lot. 4 Bac. 129. 3 Bl. 314. Co. Lit. 71. 6. Comyn
8. Pl. 225. Lawes 167. 5 Hob. 233. 1 Haud. 338-9.

Thus it does not confess matter which
constitutes departure. It advances a legal
proposition viz. y. t. z. allegations on y other
side are insufft. in law to maintain the
action or defence, as a traverse denies mat-
ter of fact. 4 Rem. denies major proposition of a syllogism.

It is sd. in strictness to be not a plea
but an excuse for not pleading. 3 Hk. 292.
3 Bl. 314. apdx. 23. 4. 1 Bac. 30. 129.

Hence it is sd. to be an irregular & collateral plea of
pleading. Lawes 42. 167. But tho' not in strict-
ness a plea yet a traverse is a good way of answering a plea.

Denumer may be taken to any part of y. plead-
ing. 4 Bac. 129. Co. L. 72. 1. 5 Hk. 132.

A denumer special, in genl., admits at C. L. no
other facts than such as are well, pleaded i. e.
rightly pleaded both as to matter & form.

This proposition must be taken with
some exceptions.

1st. A denumer necessarily admits in genl. those facts
which are ill pleaded for y purpose & y argument.
& if deciding upon their sufficiency as pleaded, as
a denumer to facts well pleaded does in C. L. Tho'
not for y purpose of concluding y facts denumer
ring as to y facts so pleaded.

But since y Stat. 4th & 5th June it confesses if
genl. all such informal allegations as are used
under it by those Stat. Co. L. 31. 4. 5. 7. Lawes 167.
Hob. 36. 233. 1 Haud. 338. n. 8 all merely for.

mal defect are aided by gentl. remembrance, i.e. if not speci-
ally removed to. 1 Bac. 94. 5. Lawes. 168. 9. Hob. 252. 233.

Note; Secus of act pleaded as matter of estop-
pel, or against a prior admission upon the
record. & remembrance will never confess it, for record will decide it.

Thus if in "Court. Broken". & plty. assigns some
breaches well & some ill. & y. Def. demurs, gentl.
or specially as the case may require) to y. whole, the
plty. has judgment only on those wh. are well assigned.

4 Bac. 131. 5 Com. 139. 1 Wils. 248. Fitt. 191. Halk. 218.
2 Kems. 286. Com. Pl. 285. Sid. 10. Bro. 1. 557.

How y. breaches ill assigned are not confessed.
Note, if they are confessed when in substance, how
can it avail y. plty. in y. principal case?

116.

Hence also a demurser never confesses an
allegation wh. contradicts what before appears
certain on y. record, as if one party having con-
fessed an allegation on y. other side, afterwards
alleges wh. is inconsistent with it & y. latter al-
legation is removed to, or pleads a record to sh.
he was a party; & then make an avowt. with
it. 3 Lev. 124. Bro. 6. 35. Lawes 168.

How y. matter alleged is not well plead-
ed, for y. avowt. is inadmissible in y. one case
as being against a prior confession, & in y. other
on y. ground of estoppel.

In both cases it is opposed to that is be-
fore made certain.

Is an avowt. of what is impossible is not
confessed by remembrance. 1 Sid. 10. Com. Pl. Pl. 2. 6.
g. 6. Lawes 168. Com. Pl. Pl. 2. 6.

It never admits gentl. removed wh. appears on

the record incapable of being proved legally.

Halk. 561. Lawes 108. 4 Bac. 131.

The avowit. of such facts is itself a good
cause of demurrer. E. G. case of Estoppel.

Lup. 1 Hic. 10. Lawes 45.

Again it does not admit allegations which
are importunent or wh. are not material or
favorable. Lawes 108. Halk. 561. 4 Bac. 131.

Com. D. 139.

For what he can't traverse he can't ad-
mit by not traversing, but if a mater-
ial fact is well pleaded, a Demurrer will
confess it, tho' it ed. not have been admitted
by traversed. - as consideration in "Assumpsit" a
science in certain cases, or fictions of Law.

So if facts in themselves immaterial but
made material & favorable by being dis-
tinctly stated, or precisely pleaded.

It never admits of truth of importunent
or immaterial accounts. 5 Com. 139. 4 Bac. 131.

Halk. 507. or 561.

It never admits conclusions of Law made by
advocate party from fact stated.

It admits matter of fact only. Hobt. 56. 4 Bac. 131.
E. G. "Promit ei bene licuit" on a plea of just-
ification is not confessed by demurrer.

Hobt. 56. 4 Bac. 131.

So in "indebitatus Assumpsit" if a fact alleged do
not raise a promise in law, Demurrer does
not confess the promise. The Ct. must con-

clude what is law.

- III. After an issue, in fact, joined (wh. is done by adding the similiter) there can be no demurrer, an issue joined closes all γ pleadings & all further altercation in any form is thus precluded.

1 Phoe. 213.

Coke & Blackstone call a demurrer an ~~issue~~ issue in law. 3 Bolk. 314. 15. Co. Lit. 71.2.

This is not strictly correct, for merely tendering an issue & concluding to the Ct. does not preclude γ other party from demurring. 4 Bac. (It is tendering an issue in law, when it is joined by joinder. L. 4.)

So an issue in fact, for γ issue is not closed till joinder. 4 Bac. 54. Lawes 43. Co. Lit. 126. a. 3 Bolk. 314. 15.

It is substantially a traverse of γ adverse party's major proposition in γ syllogistic form of pleading.

If there is a demurrer & an issue in fact in γ same case (as there may be in γ same declaration &c.) γ demurrer is only to be first tried for in this way, the jury may assess all damages at once wh. they do not do it γ issue in fact way first tried, & both issues found for γ plaintiff.

Still it is in γ discretion of γ Ct. to try either first. 3 Bac. 130. 5 Com. 136; Co. Lit. 72. n. 125. b. Palmer 319.

In the last case judgt. is for γ plaintiff. in demurrer he may if he pleases enter a not pros. as to γ issue in fact & have his damages assessed on the first demurrer only.

E.g. Several benches assigned in Court broken, &
some removed to, others traversed. 4 Bac. 120. S.
Com. 136. Hallk. 219. Alia. 574.

There can't be a demurrer to a demurrer. 112.
It works a discontinuance of γ party making
such a demurrer. Comb. 306. Laves 172.
4 Bac. 130. La. R. 20. Hallk. 219.

La. Holt says there may be, where a demur-
rer to a plea in abatement is not appo-
site, then γ demurrer itself may be re-
moved to. Comb. 306.

This, however is Hebrew to me, (& me too)

J. G. L.

Qu. Does an inapposite demurrer mean
one praying judgt. in chief? Laves 172.

Contra Hallk. 219. Wier. 453.
Indeed how can it ever be proper? not law from au-
thority #1

In all other cases I trust at any rate γ
adverse party must join. Comb. 306. for
as an issue in law reaches this γ whole record
it can't be immaterial.

If La. Holt's exception is correct (which I doubt)
it is confined to only one.

If γ depts. demurs to γ decln. & concludes in 113.
abatement. γ pth. may join in bar & have judgt.
in chief, if γ decln. is good; for γ decln. is
confessed. Laves 172. 3. 1 Lev. 223.

Demurrers are of two kinds, genl. and
special. 4 Bac. 132. 5 Com. 138. Co. L. 72. Laves 167.

A demurrer not assigning specially any par-

particular cause, but merely stating y cause genl.
as that it is duplex &c. is a genl. demur.

If demur pointing out specially any
particular mistake or defect on wh. it is found-
ed, is a special demur.

4 Bac. 132. Co. Lit. 72.

The latter Mr. Laves remarks were in-
troduced by Stat. 27. Eliz. c. 5. Laves 167.8.

They were rather made necessary by yt. Stat.
in certain cases where genl. demurrs were
proper at C. L. 1 Humd. 37. b. Hobt. 232.

1 Kent. 240. 4 Bac. 132. Laves 167.8.
for special demurrs were in use before
that Stat.

To constitute a special demur-
rer, y cause if y demur must not only be
assigned but set forth specially.

Assigning cause, if it is assigned genl., does
not make y demur special.

If cause may be assigned in such genl.
terms as to make it genl.

E.g. that y decl. is uncertain &
void in form. This leaves y demur genl.

4 Bac. 132. 1 Wils. 219. 1 Ohio. 242.

Com. 6. 297. 2 La. R. 798.

Again duplicity must be pointed out specially.

If a party demur to a plea of y opposite
party as being double & informal his demur
is not special. But if he points out specif-
ically in what y duplicity consists then it is.

Formerly demurrs in Eng. were always special

1 Bac. 132. 1 Kent. 240. & Leake says it is a
good rule to make them special in all cases.
2 Paul. 267.

It is doubtless a safer mode when there can be
a doubt whether a pleading answered to as fault-
ty in substance or only in form.

A special answer reaches all defects which
a genl. answer does. & many others wh. a genl.
answer does not.

It is a genl. rule yt. a omission of all such 114.
things as are material to a right of action or
defense (i.e.) yt. (if) all substantial defects
are reached as well by genl. or special answer.

But 3 Sts. 27 Eliz. & 185 Anne also all defects
on genl. answer. if sufft. matter appears in
proceedings or pleadings, upon wh. a Ct. can give
jdg't. accordg. to a very right of a cause.
1 Bac. 94.5.

They are reached by special answer only.
the same at Co. L. - see Pl. 1013. 337. Halk. 194.*
2 Lidd. 385. 3 T.R. 186. 1 Ch. Pl. 456. 2 Do. 679.
& 682. 1 Bac. 132. 3. 10 Co. 88. Latch. 135.
Co. Lit. 72 a. Stra. 624. Holt. 127. 164.
Hutt. 115. 3 Mod. 18. Sol. 291. 2 Pol. 315.
Laves 167. 8. Com. Pl. 356. Co. Lit. 162.

The rule does not extend to dilatory pleas, i.e. inart.*

A answer to a plea in abatement, never need
be special. The reason is that those pleas
are not favored but are odious in law.

The Stats. Eliz. & Anne do not require it.

The object of 3 Stat. way to prevent exception.

The st. of Eliz. introduced 3 rule of demurr. specially for such objects in genl.

That of 4 & 5 Anne act^{ly}. reenacting the same genl. provisions extends 3 rule to certain particular defects expressly named in it. 1 Bac. 133. 4. 6.

Stat. 27 Eliz. extends not to appeals, present. nt. indictm^{ts}. or actions on penal sts.

Com. D. Vol. 2. 7. 1 Chit. 642.

But 3 Stat. 4 Geo. 2^d c. 26 extends 3 rule to action on penal sts. 1 Chit. Vol. 642.

It has been observed yt. in all pleads. two things are to be observed. 1st That the mat-
ter pleaded, be su^{ff}t. 2^d That it be alleged according to 3 forms of law.

The want of either of these requisites is good cause of demur.

If 3 pleas. is deficient in matter or substance, genl. demur. is proper.

If in form only, a special demur. is necessary. Hobt. 232. 4 Bac. 2. 133. 7 Mod. 71.

2 G. R. 98. 882. Le. Rd. 798. 882. Co. Lit. 302.

The omission of that withth. wh. 3 very right does not appear, is a defect in substance.

The omission of that, withth. wh. 3 very right does appear, is a defect in form only.

C.G. Of defect in substance. The Pltff. does not
aver performance of a condition precedent, when
such an avermt. is necessary, or omits to aver
science in sovt. in cases in wh. science is the
gist of y action. Or consideration in "Assump't."
Or conversion in Grover &c.

Ex. Of defect in form, Duplicity,
want of venue in transitory actions &c. want
of time or day-certain in a decln. 4 Bac. 2. 119, 134.

When ergo there is a total want of substance
as if one shd. sue another in slander for
calling him a fool or dandy or when a material all-
egation is omitted (as if y Pltff. in Grover shd.
not state "property" or in "Druspa's possession")
y genl. demr. as well as well as a special
one wd. reach y defect. Hobb. 133, 198, 232, 301.

Co. Lit. 72. a. 3 Pl. 334. Stra. 624. Com. 138.
Barth. 389. 1 Sid. 184.

If y party pleads any thing on y face of the
record by wh. he appears to be estopped from
pleading, it is ill on genl. demr. (i.e. I con-
clude if y allegation answered to one ma-
terial) for y objection is not to y form of y
avermt. but to y avermt. of y fact in any
shape. Lawes 170. 138. 140. 146. 141. 58. 151.

Will. 13. Or y other 110.

Party may reply y matter of Estoppel spec-
ially. Lawes. 171.

A special demr. reaches no other formal
defects than such as specially assigned for
cause of demr. As to all defects not thus
assigned, it is but a genl. demer.

4 Bac. 182. 10 Co. 38. n 88.

See with "Evidence" p. 43 & note.

The genl. rule is on onus. to decln. if
judgt. is given, no similar or concurrent
action can afterd. be sustained on 3 same
cause, or on 3 same grounds as were disclosed
in 3 first decln. 2 Bl. R. 827. 6 Co. 7.

Bro. E. 668. Peake Ev. 36. 1 Chit. 196.

1 Mod. 207.

The judgt. is final; for a final judgt. decidi-
ing 3 right in controversy, must determine 3
controversy, or litigation wd. be endless.

1 Chit. 195. 1 Mod. 267.

Not so if 3 first action was misconceived
(e.g.) Trespas when there was 3 proper action,
for then 3 two actions are not concurrent.

The right claimed in 3 2^d. d. not
be decided in 3 1st. The judgt. does not pre-
vent his bringing a subseqt. proper action.

If 3 p^{ty}. failed in 3 first for want of un-
derl. allegation wh. is supplied in 3 2^d.

Peake Ev. 37. 2 Ven. 169. 2 Saund. 47. 4 Bac. 116.

5 Mod. 20. 1 Chit. 195. 6 Co. 7. Bro. E. 35.

Chit. 81. 4 Bac. 15. 3 Wils. 230. 204. Esp. 165.

(9 Co. 110) 2 Bl. R. 799. 827. 831. Bro. E. 667. 8.

2 Ven. 169. Rayd. 472. 2 Mod. 318.

And 3 p^{ty}. is bound by a former judgt. (ut
sup.) tho he failed in 3 first action on the
genl. issue or a special plea in bar. 6 Co. 7a.

Bro. E. 668. for it is sufft. if 3 right in
question has been once decided between the par-
ties, whatever was 3 form of 3 issue.

But a judgt. against 3 p^{ty}. in one real ac-
tion is not a bar to another of a higher na-
ture, to try his higher right to the subject.

3 East 366. For this

actions are not similar nor concurrent nor is the right of same. 4 Bac. 115. 6 Co. 7.

This rule can't hold in Cont. for we have but one real action viz. disseisin. Indeed that in strictness, is not a real action but rather a mixed one, tho' universally called real, for damages are recovered in it, tho' but for a freehold.

But tho' a decln. be insufft. tho' a mistake in pdg. yet if a deft. take no advantage of it, but pleads a special plea, upon wh. a ptb. takes issue & a right of a matter is found for a deft. a ptb. shall have no other action for a same cause, a merits having been tried & a right decided.

4 Bac. 116. Shaw. 220. 6 Mod. 207. (e.g.) To an insufft. decln. a deft. pleads a release & it is found for him.

But a recovery vs. A. for fraudulently recommending B. is no bar to an action vs. B. on a cont. obtained by a recommendation, for a causes of action are diff't.

2 Esp. R. 208. 1 Day 22. Peck v. 172.

Bul. 87.

A demr. shd. extend to a whole decln. plea for, in a part if it is otherwise answered & shd. be co-extensive with a part not otherwise answered, if not it is a discontinuance. Laves 171. 2. Com. D. Pl. G. 1. Laves 155. 6. 100. Willes 480.

A demr. reaches back thro' whole record &

attached upon the first substantial defect in the
pleas. Com. D. Pl. 28. Halk. 518; 19. 1 Saunders. 285.
I say substantial defect, for if
a formal defect has been pointed out, it is waived.

But the Ct. must give judgment on the whole record
even tho' the parties join in answer upon a
single point or particular part of the pleas.
(e.g.) Decl. insufft. Plea in bar and
Repl. both good answer to the Repl.

Here the only question in the answer, is wh-
ether the replication is good, but this is not
the only question for the Ct. to decide. They
must look back to the Decl. & see whether
it is good. If they find a substantial
defect, then judgment must go vs. the pleader.

1 Chy. Pl. 637. Hob. 83. 56. 199; 200.

5 Co. In l. 90. 110. 4 Bac. 131. 137.

Le. Re 1080. Halk. 458. 640.

5 Co. 120. 130. 6. 5 Le. 244. 2 Hen. 79.

148 to the mode of entering judgment in such
case, see correct of judgment. 1 Saunders. 285. n.
Com. D. Pl. 6. 37. 2 Mills. 150.

But there is an exception to the rule, to set
on board for nonperformance of copy, or award
&c. if the pleader shows an insufft. plea, & the
in his replication assigns no sufft. breach,
the pleader shall on answer have judgment. Tho' the
decl. is by itself good & the plea ill, for in
these cases the true cause of the cause if not
does not arise till the replication is given.

The Repl. in such cases is a sort
of supplement to the decl. disclosing the particu-

ular grounds on wh. & finally is claimed. No pt.
tho. & repl. is in & over if p. l. c. subject to &
plea put in effect it is part of & decl. &
hence & repl. is in & order st. till service
pt. of & plea.

3 Co. 52. 8 Co. 120. b. Palmer. 287. 2 Bulst. 94.
Cro. J. 133. 221. Ld. R. 1080.

No if one plea in bar wh. goes to & whole
decl. is dem. to & adjdg. sufft. Tho. &
deft. plead several pleas in bar, judgt. will
in for & deft. even tho. & issue upon another
or plea be found for & p. l. c. 1. Claim. 80.
2 Bur. 742. 789.

* (9th good form of demur. is to be found in 3 Blk. Appdx.)
For there is one sufft. defence, & it appears
from & whole record pt. & p. l. c. ought to be
allowed.

*

Form of demur. in Cont. is "that & decl.
& matter therein contained are insufft. in law
& hence he prays judgt." &c.

Founders pt. decl. & matter &c. are
sufft. &c. & hence he prays judgt. not
accept. the usual in Eng. to conclude &
demur. with a verification. Lawes 172.

1 Leon 24. 32 Mod. 132. - For Eng. form
3 Blk. Appdx. 23. 4 Bac. 120. Co. L. 71. b.
Lawes 252. 4.

In civil cases judgt. taken on demur. follows
& nature of & p. l. c. Com. to. Hence judgt.
on demur. (except upon dilatory pleas) is per-
emptory i.e. final. 3 Bac. 132. Fink. 306.

11 Co. 60. Cro. E. 195. Dyer 69. 331.

If erro over. is to any plea in chief ei-
ther gt. & plth. recover or gt. & deft. go fine
sic it is a final judgt.

As in criminal cases short of felony, 4 Bac.
132. Cro. E. 196. 2 Hawk. 334. 11 Co. 60. 1 Roll. 252.
4 Bl. 323, 328.

So that gt. & deft. is not allowed to plead
over when his erro. is overruled, except
when gt. & deft. charge antr. to felony. The
law allows this exception "in favorem vite".

In prosecuting for felony or any capital
offence, gt. better opinion is, gt. & prisoner
may plead over after his erro. is overruled.

4 Bac. 324, 328. 2 Hawk. 334. 2 Hale 257
Cro. E. 196. (Contrary to Hale 257, 258, 315.
not law. J. G.)

If a erro. to a plea in abatement is once
ruled, gt. judgt. is not in chief of course,
but gt. award of gt. & lt. is a Respondent
Ouster.

Objection to Evidence.

119.

In some cases where pleadings terminate in an issue in fact, one party may take an examination of the case from the jury to the Ct. by moving to or upon the evidence wh. the adverse party exhibits in support of the issue. 4 Bac. 136. Co. L. 72.

Allen 18. Rayn. 404. Bull. 313.

This then called a move. to evid. is strictly a move. to the fact shown in evid. & in this respect it is distinguished from a common move. wh. is regularly taken to the pleadings.

Move. to evid. is taken before the party moving exhibits any evid. on his side. * Root. 570.
For if the testimony on both sides were taken together, a move. to necessarily refer to comparative weight of evid. to the Ct. a question wh. belongs to the jury. * unless he waives his evid. after giving

A move. to evid. might be taken to the whole of the evid. exhibited in support of the issue, & can be taken to the evidence of the party only who takes the moving probandi

They under the genl. rule of competent evid. must be admitted to.

If part of the evid. do. be moved to, part only do. be presented to the Ct. & thus the Ct. do. not decide upon the validity of the whole.

It is to be observed that relevancy of evid. is matter to be decided by the Ct. The relevancy being established, the question how far it conduces to prove the issue or fact to be

ascertained is matter the fact to be determined
by 3 jury. 2 H. Bl. 205. Doug. 360.

That 3 Ct. can never weigh 3 evid. but only de-
termine its relevancy it can never be proper to
ans. to evid. wh. is clearly relevant to 3 whole
issue however weak it may be, & evid. is al-
ways relevant to any issue wh. it conduces to
prove. 2 H. Bl. 205.

It is not material whether 3 jury believe one
word or not, it is sufft. if it conduces in
any degree to prove it.

The answer puts an end to 3 question of fact
& refers to 3 Ct. 3 application of 3 Law to 3
3 facts shown in 3 evid. It therefore de-
termines 3 facts shown in 3 evid. by 3 other
party, & is like other answer. denies their leg-
al operation in his favour i.e. their suffy.
in law to support 3 issue.

4 Bacc. 136. 2 146. Co. L. 72. 2 H. Bl. 205. 6.

In 3 nature of 3 thing says, 3 fact must
be first ascertained. till yt. is done, 3 ques-
tion to law can't arise on answer. 2 H. Bl. 205-6.

Hence, 3 necessity of 3 admissions heretofore
mentioned, wh. 3 party coming to 3 evid. is in
some cases required to make upon 3 record,
for a legal proposition can't be predicated
with. some fact.

There has been some controversy with regards to
3 circumstances under wh. a party is bound to

join in answer.

When a whole evid. exhibited in support of a plea is written, there never was any doubt that it might be drawn to it by party exhibiting it must join in answer or waive the evid. for by the writing of evid. it made certain so that there could be a variance.

If he withdraws a evid. he withdraws the whole of it. C. G. When a deed is exhibited as evidence to a title or contract. Hist. 106.

1 Bac. 196. 5 Co. 104. a. Co. E. 751. 2 Co. 72. a. 3 Bl. 372. 1 Root. 570. Bul. N. D. 313.

There are other modes of taking advantage of irrelevancy. The party against whom a evid. is put may file a bill of exceptions.

The answer is however, the best way, it brings the matter to a summary judgment.

e.g. 9th. brings debt on bond vs. B. but brings it before the debt has become due. Now a debt may file a bill of exceptions, & take notes, but the most unexceptionable mode is to answer. It appears on the face of the deed that the debt is not due.

How far a party is bound to join in answer to parcel evid. is a question very recently settled.

By the old authorities it was not well settled. 1 Bac. 125. 1 Ro. 84. Co. L. 72. a. 3 Co. 104. a. Cro. 2551. 2. 3 Bl. 372. Bul. N. D. 313.

According to Cro. E. 751. 2. he is not bound to join at all because the evid. is uncertain.

But γ rule in this extent is not law, and it is clearly settled in γ state as well as in γ recent cases.

II. That tho' all γ evi. kept in parol, both parties may agree to join in γ move. to it, for he who joins it waives any inaccuracy in γ move. Bro. E. 7, 52.

III. It is now settled yt. if one of γ parties produces witnesses to prove any significant fact, γ adverse party may, by admitting γ fact itself on γ record, compel him either to join in γ move. or waive γ evi. adduced to prove γ fact. Allen 18. 2 H. Bl. 206.

e.g. Suppose in an action of Trover by Bailor vs. Bailee, γ plff. produces witnesses to prove neglect. Now γ def. may admit this very fact of neglect & satisfy γ move, for neglect does not amt. to conversion.

III. And it seems now to be also settled yt. if γ parol evi. exhibited be certain (i.e.) direct & explicit, as contradistinguished from circumstantial) γ adverse party by confessing it on γ record to be true may compel γ party producing it to join in γ move. to it, or waive it.

e.g. Suppose γ question to be whether a certain fact did or did not take place, if γ witness declares "I saw such an act done" "I know γ fact to be thus" his evi. is certain. But if he testifies a collateral fact wh. renders γ other probable, his evi. is circumstantial. By confessing indeterminate evi. he does not confess γ fact, for

3 evd. is not direct. & ago
2 H. Bl. 206.

IV. If 3 evd. introduced is loose & indeterminate, & adverse party can't remove withl. admitting as being certain & determinate as well as true.

But by making such an admission upon 3 record he may remove to it whether it is written or parcel, & then 3 party producing it must join or waive 3 evd.

5 Co. 104. 2 H. Bl. 207. Bul. 319.

But he is not bound withl. such admission in error. B. & M. 312. For 3 fact testified about is not ascertained even admitting 3 evd. to be true. But 3 question of fact evd. he referred to. 3 Ct. E. G. The witness says. 122.
"I believe 3 fact is so" "according to my best recollection it is so"

In this case 3 party removing. shd. admit 3 evd. as being certain & determinate (i.e. as if it was positive & unqualified) as well as true. & thus 3 weight of 3 evd. wd. be referred to 3 Ct. In merely admitting 3 evd. to be true only, 3 fact wh. 3 evd. conduces to prove is left unascertained.

(These Rules are well suited to the exigency of the case. E. G.)

V. If 3 evd. produced is circumstantial 3 party removing. to it must distinctly admit upon 3 record every fact & conclusion wh. it conduces to prove. i.e. every thing claimed from it wh. 3 jury might infer from it.

He may then remove to it, tho. it is parcel. Hence, it is not competent for him to remove & so converse 3 adverse party is not obliged to join in 3 removal. Doug. 114. 27. 129, 2 H. Bl. 207. 9. 4 Allen 18. Bul. 363. 11th. 22. 31.

By circumstantial evid. is meant evid. of
some distinct collateral fact from wh. the
principal fact may be inferred or presumed.

But the truth of such evid. always may
exist with the possible non-existence of the
principal fact.

Ind. evid. conduces to prove every
point to wh. it is relevant. e.g. If cir-
cumstances are given in evid. vs. a receipt
to a bill of exchange to raise a presump-
tion that he knew the paper to be fictiti-
ous, he must admit in his answer, to evid.
y.t. he knew the fact, & not merely y.t. the evid.
is true. scuy. the weight of evid. shd. be
referred to the Ct. for the matter of fact shd. not
be ascertained since the evid. might all be true
consistently with the facts. ign.

2 H. Bl. 207-9.

If the party coming in is too late to
make out admissions wh. the rules require
the adverse party going in to answer. the Ct. can
give no judgment.

For the answer, shd. refer to the truth &
right as well as to relevancy to the Ct. (at sub.)

In such cases ergo a "reviser de novo"
must be awarded. Bul. N. D. 312. 4 Bac. 187.

2 H. Bl. 209.

The superior Ct. of Cont. in 1787 decided
on a motion to prevent evid. before a single
magistrate by party. producing was not ob-
liged to join because, a move. in such a case
shd. tend to entangle proceedings. Kibb. 352.

Qu. How can such a reason be al-
lowed to control or affect a question of Law?

The same Ct. ugt. decided in 1795 y.t. & party
offering & evd. was not obliged to join in a
conver. to it, tho' it was chiefly written & all
agreed to. 2 Hwift. 257. - not Lac.

The point in issue on a conver. to evd. is
whether & evd. removed to is ugt. in law
to maintain & issue in fact.

Hence on such a conver. no
advantage is to be taken of any defect in
pleading. But advantage may be taken
aft. of such defects by motion in arrest
of judgment as after verdict I conclude.

Doug. 208. Bul. 415.

The issue being considered as proved by
& facts removed to as evd. not being re-
moved to under & motion in arrest of judgment.

The party, whose evd. is removed to, may al. 124.
wasp remove & judgment of & Ct., whether he
ought to join; for if there is no colorable
cause of removal & Ct. will not allow it,
lest justice shd. be delayed on frivolous
pretences. 4 Bac. 126. Bul. N. P. 314. 4th ed. 18.
2 Roll. R. 47. 117. 2 H. Bl. 205. 8. Lit. 437.

On removal to evd. & joinder, & usual course
is to discharge & jury immediately, & & writ of
enquiry is executed afterwards, tho' sometimes
they assess & damages provisionally before the
conver. is determined. Bul. N. P. 314. Cro. C. 133.

Lac. Res. 60. 2 H. Bl. 410. Hal. 283. Doug. 212.

*(J. J. - the best course course in a long trial.) 2 H. Bl. 200.

In cont. there is no writ of inquiry. Damages

are offered in answer to evid. by 3 Ct. if de-
cided for 3 suff. 1 Roll 570. 2 Hoist. 258.

125. If any particular evid. in support of 3 issue
bein^g objected to is admitted by 3 judge, 3
party objecting can't remove for yt cause &
to yt. court of 3 evid. alone, for 3 court
must go to 3 whole evid. given in support
of 3 issue.

The proper remedy is a bill of excep-
tions or motion for a new trial. Bul. 314.
Holt. 284. See Writs of Error.

If 3 party offering to remove to evid. is over-
ruled by 3 Ct., his remedy is by bill of
exceptions. 4 Bac. 126. 2 Bac. 326. 9 Co. 136.
1 John 391. Cro. E. 331. Cro. C. 241. or 259.

& a venire de novo must be awarded.

The whole proceeding in answer to evid. (as
3 entering it on 3 record admits it to be true
is under 3 direction of 3 Ct. 2 H. B. 208.9.

And 3 Ct. may prevent it if 3 matter
appears clear in law. 2 Roll. R. 217.

(See Bul. 314. & H. B. 200.)

Mode of Removing to Evidence.

The party removing states it upon 3 record,
makes 3 necessary admissions, alleges yt. it is
not sufft. in law to maintain 3 issue, and
concludes by praying judgment yt. for want
of sufft. matter in yt. behalf 3 jury may
be discharged from giving any verdict, &
also if taken by capt. yt. 3 Jtts. may be
barr'd &c.

Bulla di. Pius 314. 2 H. B. 200.

2 Leo. 256.

Note. In a H. Bl. case is a famous case and
shd. be carefully studied & understood.

Note. This proceeding of amr. to void. was
not very common among lawyers from the
danger of committing themselves by 3 admis-
sions necessary to support a amr.

But in case of Gibson & Hunter a H. Bl.
& difficulties have been explained & doubts re-
moved, & this amr. is not unfrequently
made.

Arrest of Judgt. & Repleader.

To arrest Judgt. is to stop or stay it. This 125.
is done on motion reduced to writing & en-
tered on 3 record of 3 Ct.

This is usually had only
after an issue in fact tried, & a verdict
found. 3 Bl. 386. 393.

But this is not universally 3 case for
it may be after a default. 3 Burr. 900.
or after a amr. to void. determined. Long. 208.
213. 2 Stra. 1271. or after amr. to void. over-
ruled.

The principle on wh. Judgt. is ar-
rested is pt. 3 Judgt. of 3 Ct. is a conclusion
of law from 3 facts ascertained by 3 record
& as it must be given on 3 whole record,
he, who sees not upon 3 whole record ap-
pear entitled to it, can't have it, even tho.

a verdict has been found, or a default suffered, or a juror. to revid. determined in his favour.

The issue, raised by 7 motion, is an issue in law.

Judgt. being arrested for intrinsic causes only i.e. such as appear on 7 face of 7 record, as when 7 decln. varies totally from 7 writ, one being on debt & other on case. 3 Blk. 393.

So when 7 verdict varies materially from 7 issue, for in such case 7 issue not being found, either way, it is improper to render judgt. upon it. The facts in issue are not ascertained. e.g. slander for 7 words "he is a bankrupt" verdict finding 7 words "he will be a bankrupt" 3 Bl. 393.

So if 7 decln. is wholly imperfect, as if it declares no cause of action, Plty. can't have judgt. tho' he may have obtained a verdict. 3 Bl. 127, 393. The verdict can't contain or disclose facts not alleged. Plty. says 7 decln. contain no cause of action, 7 verdict can't make one.

And on 7 other hand if Plty. pleads on wh. he has obtained verdict & discloses no legal defence to 7 action 7 decln. being good judge, may be arrested by Plty. 3 Bl. 393.

Bro. 8. 778. for 7 verdict only verifies 7 facts alleged in 7 plea in bar, but those facts do not constitute a good defence for 7 plea & verdict being nothing asserted in 7 decln.

To ascertain what defects in pleading will support a motion in arrest of judgment, after verdict & Genl. Rule is this.

Rule, After genl. verdict, judgment may be arrested for any cause wh. might be assigned after verdict & judgment for Error.

In other words if judgment in pursuance of verdict sh. be erroneous, it may be arrested, 5 Com. 175. 2 Roll 30. 716. 745. Salk. 77.

To determine what defects will, & what will not render judgment, after verdict, erroneous, & Genl. Rule is this.

Rule. If a statement of title or cause of action be defective, it is added by genl. verdict.

Here judgment given in pursuance of verdict sh. not be erroneous.

E. G. Decla. in trespass does not lay a day-certain, this, tho. ill at C. L. on genl. demurr., is added by verdict.

Coop. 825. Stra. 237. 10. 23. 3 Bl. 394. Doug. 658. Cro. E. 377.

Com. 2. p. c. 87. Salk. 363. 1 Lawr 194. 4 Bac. 317.

Bull. 320. 1. Doug. 658 & 571. Rushton vs. Appinall.

It is not now added on genl. demurr.

1 Lawr 194, Hume. 118. 286.

But if no title or cause of action or defective one is stated, it is not added by verdict, for then a judgment in pursuance of verdict sh. be erroneous. (eg. a grant of an incorporeal right by parcel alleged. - case for calling plaintiff a Jew. 3 Bl. 394. Doug. 658.

Not alleging possession in trespass 1 Hume. 154. Or notice in an action vs. indorsee

or conversion in Trover, or non-performance of a
contract precedent &c. The case in Doug. con-
tains a best exposition of this doctrine,
128. viz. yt if a D^{ty}. in an action of Tresp^{ss}
mistakes a fact in a statement of a cause of
action, a verdict will aid a (f^{act}u^{al} defect).
But if a cause of action be defective nothing
will cure it.

The same distinction applies "mutatis
mutandis" to a defence pleaded by a D^{ty}.
e.g. In a case of "Not Guilty" pleaded to debt
on "Ass^t" vs. an Exec^r, or a promise by the tes-
tator, a D^{ty}. pleads yt. he did not promise.
Hulk. 965. Bul. 320. 3 Burr. 1528.
Cal. 130. Carth. 209. 2 Bl. 395. Bro. & 378.

Again it is an invariable rule that any
defect in pleadg. yt. will support a motion
in arrest of judgment, must be such as wd.
have been fatal on Genl. D^{mn}. 2 Bl. 393.
e.g. In an action for slander the
D^{ty}. alleges yt. a D^{ty}. called him a "Jew" &
D^{ty}. denies it.

Now if a D^{ty}. can establish a fact by verdict a
D^{ty}. may move in arrest of judgment, that a
word is not actionable.

But this rule does not hold a con-
v^{er}sio, that whatever wd. support a genl.
D^{mn}. wd. support a motion in arrest of
judgment; for if a D^{ty}. omits some partic-
ular facts or circumstances without proving
which, a party obtaining a verdict ought
not to recover, but which is implied

from those facts (or rather from finding of those facts) wh. are acknowledged and found, the omission is added by verdict, tho- it wd. have been fatal on genl. demurrer. If the omission is added by a verdict it will not support a motion in arrest of judgment. e.g. omitting to state value in trespass. Or omitting to lay a day wh. at C. L. is ill on genl. demur.

Esph. 407. 3 Bac. 196. 590 3 Bl. 394.

Bro. J. 44. Carth. 398.

For jury in ascertaining damages (in example) are supposed to have found value.

Ho. of a grant of an "advowson" or a release pleaded witht alleging it to be by deed. Butth. 545 Bac. 317. 2 Wils. 396.

3 Blk. 394. 10 Mod. 301.

The verdict they supply fact omitted in 3 pleas, or corrects mistake. 3 Bl. 394. For 4 Ct. presume 3 verdict to be founded on a deed, since they ed. have had no other legal evid.

9th Sept. Pleads in his rejoinder that ed. be a departure. & Now if 3 Pth. demur. he will have judgment. For a departure is bad pleading.

But if 3 Pth. takes issue & a verdict is found for deft. 3 judgment. can't be arrested.

It becomes necessary to determine what defects 3 verdict does they supply. 129.

The Rule is. yt. after a genl. verdict, 3 Ct. must presume yt all facts not alleged which were necessarily implied from

these (or rather from a finding of those) wh. were
alleged, were proved to a jury on the trial.
1 Howard. 228. n. 1.

In other words & Ct. must presume in sup-
port of a verdict, every thing which in point
of fact was necessary to warrant a finding.

* Doug. 658. n. 1 T. 12. 145. Carth. 389.
Bul. 520. 1 Howard. 228. n. 1. 220. 171. c.
Stra. 1028. 1 Will. 192. Cowp. 827.

In other words still, every thing wh. it was nec-
essary to prove in proving a issue. Bul. 521.

Doug. 658. n. 1 Root. 273. 4 Bac. 86. n. 12. 487.

And thus a verdict by necessary intendment
implies a fact omitted in a finding.

For a Ct. not to presume thus, wd. be to
impeach a verdict. This is a governing
principle. 1 Howard. 228. 3. Bl. 394. 1 Mod. 292.

Thus when in trespass a party omits to
lay a day certain, a Ct. after a verdict
for trespass will presume yt. a trespass was
proved to have been committed before a
date of a writ, & thus a verdict is added tho'
it is at C. L. or genl. ass. Stra. 112.

3 Bl. 394. Carth. 130. 387.

Salk. 130. 602. 5 Mod. 287.

5 Bac. 314. 7 T. 12. 518.

For some particular time must have been proved,
& proof of trespass after such date, wd. have been
inadmissible. Tho if he lays a future day.

Carth. 398. note - but not of decl. now he need
not genl. ass. 1 Howard. 118. 169. 286. 1 Lawy 124.

Ho holden 3 Keble. 354.

They & verdict also & seal. tho it do. have
been ill on genl. over.

130.

So if & value of & thing be omitted in the
plea. Esp. 407. & Bac. 24. 55. & Bac. 196. 596.

It do. seem yt. & doctrine of curing & defects
in & pleadings by verdict is not arbitrary.

Buller observes yt. if a party alleges a
defect. witht. alleging livery of seisin, the ver-
dict cures & defect.

This can't be correct, for there is no fault.
The remark was probably made thro. inadvertence,
for it is a necessary part of every plea. yt. there
shd. be livery of seisin, & thus it do. & seal.
is aided by verdict. 1 T. R. 145. & Bac. 317.

10 Mod. 301. Hutt. 54.

But 2d. Whether it was necessary in first
instance to allege livery of seisin. Co. L. 307. c.
for & pleading do. be good witht. it even on
special over. for a plea. "ex vi termini"
implies "livery of seisin". Cro. E. 401. Lawes 48.

two D. pl. & q. Co. L. 307. b. Cro. J. 406. & Bac. 100.

(Yet Buller was the best special pleader of his time.)

So if a grant of a reversion witht. alleging
allotment. Lawes 48. & Co. 82. b. 4 T. R. 472. Lath. 130.

So if a grant of an advowson is pleaded witht.
an avowt. yt. it is by deed & found by ver-
dict, & Ct. will presume yt. a grant by deed
was proved as there can be no grant witht. one.

& Bac. 317. Hutt. 54. 2 Wils. 376.

10 Mod. 306.

They & verdict is do. to ascertain these facts
wh. from & inaccuracy of & pleading did not

appear to exist. 3 Bl. 394. 19 Mod. 292.

131. On 3 other hands nothing can be presumed from 3 verdict (i.e. presumed to have been proved) except those facts wh. are alleged & found & such as are necessarily implied from 3 finding of them. 1 T.R. 145.

Hence if 3 title or cause of action appears defective, as when there is a total want of substance, 3 defect can't be aided. Doug. 658. 1 Burr. 1728. 3 Bl. 394. e.g. actn. for calling 3 both a Jew. Here there are no facts to be presumed wh. do make 3 words actionable.

So if any facts are omitted wh. are essential to 3 cause of action &c. wh. are not inferable from 3 finding of those wh. are alleged & found, 3 fault is not cured; for 3 fact omitted can't be presumed to have been proved to 3 jury. 3 Bl. 395. 325. 1 T.R. 145. Chalk. 365. It can't be supplied by any intendment.

E.g. If in actn. on lost Box -? Performance of condition precedent is not aided, 3 decln. is not aided.

(2 Talk. 662. 320. 12.)

So if in an actn. vs. an indorsee of a Bill of Exch. notice of 3 dishonour of 3 Bill is not alleged, for 3 facts do not follow from those wh. are alleged. Not necessary to be proved to 3 jury to warrant them in finding those wh. are alleged. 4 Bac. 16. 1 T.R. 125. 2 Co. 102. 5 Com. 45. Lower 654. And 321. 1 T.R. 645. 2 H. Bl. 574. 2 Bac. 200. Doug. 658 & 671. 1 T.R. 472. 2 Root 99.

And yet, can't on principle presume any
distinct fact omitted - because in point of law 132.
merely it is necessary to warrant a recovery, & on
such presumptions can't be raised but upon
a supposition that the jury are competent
judges of the law. 1 Kent. 27.

But upon this supposition every defect
w'd. be cured by verdict, & indeed it w'd. be pre-
posterous even to make a question after
verdict as to the sufficiency of the pleadings.

Thus if in "A. B. C." no consideration is alleged,
Pltff. obtains a verdict, & omission is not
advice. 7 D. R. 251. (1 Barb. 402 contra) or strange
decision & contrary to authority, for the fact
that a promise was made does not imply
a consideration as promise is sometimes made
witht. a consideration & the consider. is essential
in law to the validity of a promise.

It is still not implied in the facts that a prom-
ise was made. It is not necessary to warrant
the finding of a promise.

Motion in arrest of judgment, after a default
operates exactly like a genl. issue.

Nothing is cured except what w'd. have
been on genl. issue; for nothing can be pre-
sumed to have been proved there being no
finding at all. 3 B. & W. 900. 2 Str. 1271.
1 Will. 171.

So after special verdict nothing is presumed
for all the facts found are specially found
& appear on the record.

In some cases, however, judgment will not be
arrested, even for the greatest defects, & even

tho' nothing is moved by a verdict, Hob. 56. 198.
4 Bac. 131. L. R. 131. 8 Co. 120. 131.

This happens when a first radical
fault in a pleading is on a side of a party
who moves in arrest; for there being
a radical fault, he ed. not be entitled to
judgt. at any rate, & a judgt. must be
given on a whole record.

Thus if a verdict is in favour of a party
who upon a record appears entitled to judgt.
he shall have judgt. however faulty, on
his part, may be a particular pleading
on wh. a issue is taken. C. J. Decln. wholly
insufft. - Plea in bar frivolous, & issue
taken on a plea found for a deft. a deft.
can't arrest judgt., for a first radical de-
fect is on his side, & a frivolous plea
is a sufft. answer to such a decln.

Let if a decln. is good, plea in bar
& Replication both frivolous, issue ta-
ken on a Replication & found for a deft.
he shall have judgt. The Repln. is
sufft. for a plea. Hob. 56. 199. 8 Co. 120.
9 Co. 110. 12 Co. 244. (4 Bac. 131. L. R. 1080. 1.) 3 Lanes 238.

And on a other hands when judgt. in sum-
marie of a verdict is arrested judgt. in
chief vs. a party for whom verdict is found
may sometimes be reversed.

This is more than an arrest of judgt.
The Rule is this "If a party, vs. whom a
issue is found, appears upon a whole re-

case entitled to judgment, it must be rendered in his favour, & verdict to & contrary notwithstanding. 1 Burr. 331. 5 C. 1 Bl. Pl. 524.

This is called a judgment verdicto non obstante.

E.g. Decln. wholly insufficient, issue on & plea found for & plff. Judgment in pursuance of & verdict will be arrested & judgment ordered for & (plff.) deft. It wd. be to no purpose to award a rejoinder, that wd. not help & decln. nor ed. any issue that co. be taken on a plea in bar help & decln. 134.

6 Br. Par. cas. 517. 1 Ch. l. Pl. 634. Hobt. 36. 159. 200. 8 Co. 120. 153. 1 Burr. 301. - 6.

But judgment is never thus rendered except in very clear cases. If & case is not such, a rejoinder may be awarded.

Suppose & decln. good & & plea in bar frivolous, & issue taken on & plea in bar & found for & deft. Here & plff. may arrest & judgment, & claim one in his favour.

Defects in the Issue.

But if issue is taken on an immaterial point, when material facts might have been traversed, so yt. & finding does not in law decide & right. Judgment must be arrested & rejoinder awarded.

2 Rand. 319. abn. 6. Carth. 371. Cro. J. 434. 585.

1 Rand. 228. n. 1. Clark. 569. 2 Ray. 922.

2 Rand. 317. 8. Prac. Pl. 33. M. 1 Chit. Pl. 632. 4.

5 Mod. 1. Com. & Pl. - R. 18.

It is when & traverse being what is material into in issue a part which is not so.

E. G. C. in "Assent." vs. an Exctr. he pleads,
he made no such promise as is alleged.

2 Kent. 196. 3 Bl. 395.

How. 301. 5. 2 Burr.

Str. 894. Lol. R. 707.

Action vs. husb. & wife for wrong done by her
while sole. Plea yt. "they are not guilty"
& verdict for 3 depts. Repleader awarded.

June 176. Cr. J. 5.

Is a point not traversable as matter of
law, for in such 3 issue on th. 3 verdict
is founded being immaterial 3 Ct. can't
regularly discover from 3 record for whom
judgt. ought to be rendered.

Note, can 3 Ct. ever discover this from
an immaterial issue, except (as 3 case may
be) when it is immaterial only from being
a negative argument? I think not.

Hence 3 judgt. being arrested a re-
pleader must be awarded. E. G. On a con-
tract to pay or before payment, before the
day is pleaded precisely traversed & found
for 3 depts.

135. Again Declr. good, Plea in bar good, depts.
traverses one immaterial point & obtains ver-
dict. Judgt. must be arrested & a re-
pleader awarded, yt. 3 depts. may take issue
on a material point of 3 plea. For 3 ver-
dict decides nothing.

Note. Does not 3 depts. admit what he does
not traverse? If he says not, it is clear in 3
last case on 3 whole record yt. 3 depts. is
entitled to judgt. see Coop. 5 or 4.

I conclude 3 issue in such case is

supposed to be taken by mere mistake,
wh. & rules of practice allow to be rectified
by a repliader. Co. C. 245. Lowes 195.

1 Kent. 196. 1 Tra. 994. 3 Bl. 335. 4 Bac. 126.
Ray. 538. Le. R. 704. 102æc. 201.5. Co. J. 5.

1 Hamd. 319.

Thus, If a plea in Bar had
been wholly insufft. & P'tty. had traversed
a part of it or a whole & had obtained ver-
dict, P'tty. has judgt. for it appears
from a whole record yt. no manner of join-
ing issue co. have availed a deft. or have
formed a better issue - And a repliader
if never awarded for any defect wh. can
be cured by any manner of joining issue.

1 Bac. 206. 5 Can. B. 6. 8 Co. 120. 6.

Hobbs. 56. 199. 200. 2 Tra. 204. Tra. 394.

4 Bac. 212. a. 4 Bur. 2150.

Same rule holds & for a same reason 136.
for any other pleadings wh. are radical-
ly ill & upon wh. issue is taken & a ver-
dict found for a party traversing, in
there is a plain substantial defect
on a other side, and a result wd. have
been a same if a verdict had been for
a deft.

Thus, Suppose, as before, a plea in
bar insufft. & P'tty. takes issue upon
it & deft. has verdict. Judgt. in pur-
suance of a verdict is availed & P'tty.
has judgt. for he appears upon a whole
record entitled to it. 4 Bac. 131. 136.

9. R. 102. 11 Co. 10. 5 Bac. 286.

Le. R. 382. Salt. 142. Le. R. 254.

Repleader when awarded.

On a repleader awarded & pleadings begun
and (if regularly) at 3rd stage at wh. the
first deviation from 3 rules of pleading
occurred, or rather at 3rd first fault 3rd.
occasional & immateriality. E. G. Plea

in Bar sufft. 10th. traverses an im-
material point & has verdict. On a re-
pleader awarded & 3rd 3rd is to make a
new traverse, & make some other answer
to 3 plea in bar. Coop. 510. & Bac. 126.

Halk. 578. 173. 210. 1 Brev. 201. 6. 5th 52
& Harnd. 319. 6. May. 458. - 168.
Kibb 664.

Questioning 3rd if 3 decl. & plea are
both ill & parties may begin de novo.

Ld. Holt, says 3rd if issue is ta-
ken on an immaterial point, & then is
a 3rd fault, & repleading is to com-
mence with 3rd first fault. This I ed.
never understand. Halk. 575. & Bac. 126.

Q. How can this be?

or an amendment. or motion?
neither of wh. can properly be called a re-
pleader. Is not this 3rd meaning? -

If a repleader is awarded each party may
avail himself of 3rd generality of 3rd 3rd.

to correct his own pleading even back to 7
decl. . But if 7 decl. is not radically
ill, there shall be no replacer. West.
ought to have findgt. The rule now re-
gards defects in stating 7 title or defini-
tion such as show gt. no mode of stat-
ing co. avail. Chit. Pl. 634. Com. D. Pl. 2, 18.

Replacer for 7 immateriality of 7 issue
is never awarded in favour of 7 party who ten-
ders 7 issue. It is his fault. Findgt. goes
vs. him if 7 issue is against him. When
7 verdict is vs. him 7 pleading of 7 other
party being good does it not always appear
from 7 whole record gt 7 latter is entitled to
findgt. I think it does his material
allegations being confessed. Doug. 380. 1 Pland.
308. 1 H. B. 534. Com. 501. 2 Pland. 319.
Sic. 284.

The same thing, it appears, is true when the 137.
verdict is vs. 7 opposite party. But as
he has joined in 7 issue & 7 true traverse
he can't have findgt. rendered vs. 7 verdict.
Only a replacer.

If 7 person, tendering 7 immaterial issue
is so fortunate as to obtain a verdict, he
may replace on an accept of findgt. by the
opposite party.

The issue may be immaterial if found
one way & material if found 7 other.

E. G. Debt on bond, payable on or be-
fore such a day. Payt. before 7 day
is pleaded, precisely traversed & found for
7 plaintiff. Replacer must be awarded.

Decree if found for & left for & finding
w^d. show y^t. he was entitled to judgment.

The reason why & issue for & p^lff^s
is not added as a negative argument by
verdict, seems to be y^t. & p^lff^s so travers-
ing does not show an absolute breach.

2 Burr. 944. 4 Bac. 66. 2 Wils.

442. Com R. 148. 2 Wils. 193.

Do if "molliter manes imposuit"; if found
for left, it may be decisive. Decree, if
for & p^lff^s. But this is only aided
by verdict.

Generally, a repl^dader is never awarded
an after issue. But only after an issue
in fact tried for by a com^r. & parties
replead & whole controversy to & left.

I suppose & p^lff^s answer to & declⁿ. & & com^r.
is sufficient, & left. can in this case give judgment.
in chief 5 Mod. 102. 4 Bac. 129. 5 Co. 52.

1 Rep. 42. 1 Ch. Pl. 634. 2 Saund.
319. 2 Lacey R. Walk. 148.

The better reason y^t. & question of law
arising by com^r. can't be immaterial or
inconclusive.

When a left. has on com^r. adjudged a place
to be insufficient, & party may amend by per-
mission of & left. by default. of costs.

If a repl^dader is awarded when it ought
to be denied or "vice versa" it is subject to
a writ of error. 1 Ch. Pl. 633. 3 Bac. 126.

Salk. 579. 6 Mod. 2 Comb. 329. Day 27. 182.

In 3 first, J. J. does not wish to rep lead
8 3 deft. has not pleaded or has abandoned
his plea, & in 3 second 3 discontinuing
party is out of Ct. In neither case
is there any issue on wh. 3 J. J. deft. of the
Ct. is regarded.

At C. L. repladers were sometimes
awarded before trial. Not so in genl.
since 3 J. J. of "Remount. & Leopards", if the
issue may be cured by verdict.

1 Bac. 90. 103. 3 Kell. 664.

But if 3 defect is clearly inevitable
it may be done before trial.

Carth. 371. 4 Laves 1 Chit. 133. 1 Bac. 90.

Salk. 579. Comb. 329. - 3 Co. 664. 6 Mod. 123.

Replader is never awarded on writ 133.
by Error. 4 Bac. 727. 2 Clarend. 319. 2 Laves 12.
6 Mod. 124. Tho it was done in 3 ancient
practice. - Note, it has been allowed in
Ct. in Com. L. See form of Replader in Lute, 22.
(Journal of the Charter Day 29. 182.)

Defects in the Verdict.

Mistake in verdict of judgment might be sustained either for defect in the allegations, or in the issue, or in the verdict. E.g. Suppose finding finds only part of the issue omitting something material. 3 Bac. 296. Cro. E. 102. 2 L. Rep. 1521. 11 Mod. 844. 1089. Co. Lit. 227. 2 Sp. 2521.

In such cases the Ct. will award a venire de novo. 1 East. 111. 5 Esp. 2590. 22. Binn. 143. e.g. Demands & refusal found in Trover, 10 Co. 50. 7. without any defect amounting to a conversion.

But if the substance of the issue is found it is sufficient. Co. Lit. 227. 1 Vent. 27. 12 Mod. 5.

If the verdict varies from the substance of the issue it will be ill & judgment irregularly awarded. E.g. Jury find something foreign to the issue instead of the issue itself. 3 Bac. 299. 2 Vent. 151. 2 Roll. 49. 787. 719. A venire de novo is awarded.

But a verdict which finds the issue is not vitiated by finding more. It is surplusage. "Nihil, nec inutile non vitiat."

E.g. issue whether debt. has assets. verdict is. he has assets beyond sea. 3 Bac. 297. 299. 2 Roll. 714. Cro. J. 407. 6 Co. 57.

If the jury assess greater damages than the plea demands it is error, but still may be cured by releasing on the record the surplus & take judgment for the residue.

11 Co. 115. 5 Binn. 195. 272. 2 Bac. 223. 4 Bac. 25.

2 D.R. 113, 123. 1 H.B. 643. Exp. 2. 203. Ultra. 204.

Or y Ct. to prevent error may with. a
release give findgt. for y residue only.

4 Bac. 25. 2 Lilly Entries 503.

So if y jury find more than, both by
its own showing is entitled. 4 Bac. 26.

10 Bull. 288. Ultra. 175. Exp. 304.

2 D.R. 113, 123.

If y jury after finding a fact especially
make a conclusion of their own y Ct. is
not bound by such conclusion but will
give findgt. upon y fact found witht regard
to y conclusion. 3 Bac. 286. 11 Co. 10. Hob. 53.

- 6 or 596. C.G. On y question of seizure y
jury find some particular fact & con-
clude "8 thus S.P. was seized. If in acci-
dental case there are two conts. one good & 8 other
bad & y jury find on fact., verdict, & entire
damages findgt. is accepted & a "curia de
novis" awarded - for it is not known to y
Ct. upon what count y damages are assig-
ned or how much on each. 10 Co. 130. 11 Co. 10.

7 Bull. 8. Exp. 528. 562. 1 B. & P. 329.

331. 2 H.B. 318. 2 Bac. 7. 1 Root 346. 303.

2 H.B. 377. Ultra. 1094. Co. E. 318. 288.

If in y case y declar. do. be good on error.
for y Ct. is sufft. there being one sufft.
count.

If y y assgmt. of entire damages sh.
prevents y pth. from having findgt. not
any fault in y pleading. 3 Bac. 568.

1 H.B. 271.

Cont. Ct. if error has lately decided contra.

~~Lower~~, if several damages are assessed in sev.
140. and county. But, may then release those
assessed in 3 bad county, & take judgment on
3 other: See. Ray. 13.

Note: When several damages assessed vs.
several depts. is a ground for arresting judgment,
is a release necessary? 2 Bac. 8. 2 Esp. D. 321,
537. 11 Co. 67. Curth 19. 5 Burr. 2750.

But the entire damages are assessed yet if no
evid. was given on 3 bad county verdict
may be corrected by 3 judges notes so as to
apply to 3 good count only, & then an arrest
of judgment may be prevented. Doug. 382.
5 T.R. 967. 1 Wils. 515. 13. 1 Lev. 124.

In criminal prosecutions if one count is good
141. & 3 other bad & a genl. verdict vs. 3 depts.
judgment vs. 3 depts. will not be arrested. for 3 let.
decide punishment, & will give judgment on 3 good
count only. 2 Burr. 285. 2 Hawk. 627.
Wilk. 385. Doug. 703. 2 L.R. 888.

In cont. judgment is arrested for many ex
trinsic causes i.e. those not appearing origi
nally in 3 pleadings or verdict, & not appear
ing originally on 3 record but brot upon the
record under 3 motion in arrest of judgment.

E.g. corruption in 3 jury as asking 3 opin
ions of 3 persons, finding upon 3 cast of a
die &c. 12 R. 13. 139. 184. 51. 81. 142. 273. 277.

As of misbehaviour of 3 party to 3 jury as
tampering &c. 1. Bac. 291. 1 Wils. 642.
10. Lit. 227. 1 Vent. 125.

So if one of 3 jury were interested in 3 suit
or related to 3 prevailing party, as to form a prin-
cipal challenge. *Wib. 184. 179.* Or if he has been
an arbitrator in 3 cause before, or atty., or has
given an opinion on it. All these are
sufficient ground for arresting 3 *Judgt.*

Genl. Rule. Incompetency of a juror
if it goes to his impartiality so. In a
good cause for a principal challenge.
It is in *Cent.* a good ground for ar-
rest of *Judgt.*

But any incompetency which rais- 142.
es no presumption of partiality is not
sufft. cause for arresting *Judgt.*

Wib. 13. 142. 179. 184. 61. 87. 185. 186. 189.

In Engd. as in *Cent.* verdicts are set a-
side & *Judgt.* In certain cases not ap-
pearing on 3 *Judgments* or verdict, or not
appearing originally on 3 record.

5 Bac. 288. 291. 2. 2 Ld. 205.

Wib. 642. 6. G. Misbehav.

case of 3 jurors or parties. But in
Engd. 3 fact is entered on 3 *protesta* by a
judge at *Sci. Pri.* so as to become a part
of 3 record & 3 *Judgt.* is arrested in *Bank.*

There is a diff. between this mode of
proceeding & ours. Here 3 *ct.*, *vt.* arrests,
inquire into 3 facts, for our *cts.* all get
in *Bank.*

The same thing has been done in
Engd. in two cases upon affidavit. *5 Bac. 291.*
1 Freem. 79. John. 80. But a new trial is
usual remedy. *5 Bac. 250. John 80.*

In Cont. such extrinsic facts are alleged in & motion & found by & Ct. in wh. & motion is made, & & same Ct. decides both upon & sufficiency & & truth of & motion & on & co-exhibited.

The & only diff. between Cont. & Eng. practice is & Ct. in Eng. & judge at Ch. J. finds & facts & puts them on record as & foundation of & subsequent motion in Bank, & & Ct. here & motion is made in & Ct. in wh. & issue was tried & & facts are ascertained on a subsequent hearing of & motion in & same Ct. & being found & findgt. is entered.

On arrest of findgt. for defect in & Plea no costs are regularly allowed on either side, for & Party arresting & findgt. might have avoided & prevented & expense of a trial. *Wm. 619. 1 Ch. Pl. 633. 1 Root. 6920.*

572. 12 B. 88. 2 Vent. 196. 1 J.R. 267.

10 Ch. Pl. 638. 2. Corp. 407.

143. So if & motion in arrest is overruled & & Party moving brings error & prevails, he does not recover his costs below.
Ch. Pl. 638. 2. &
for & same reason.

This rule does not apply to arrest of findgt. in Cont. for extrinsic causes. There is a second trial or a renouveau de novo; & regularly & whole costs shall follow & final event of & suit. *1 Root 462. 1 Root 572.*

In Court. when an issue in fact is closed to
Ct. then ed. be according to former practice
no motion in arrest of judgment for 3 Ct. judges *
(Leaving 3 issue & deciding in 3 first instance
on 3 pleadings is error. Nichols vs. Farmela
Ct. of Errors June 1811.)

* If 3 pleadings under 3 genl. issue & on find-
ing 3 issue immediately gave judgment. 2 Ott. 26.

Now decided by 3 Ct. of Errors. that
exceptions to 3 pleadings can't be taken under
an issue in fact & closed to 3 Ct. yet 3 issue
must first be found by itself & aft. then
may be motion in arrest of judgment.

Leaving 3 issue & deciding in 3 first in-
stance on 3 pleadings is error. N. vs. Par. &c.
as above.

In Eng. motions in arrest of judgment
are made within 3 four first days of the
next term after trial. 3 Bl. 395.

In Court. 3 motion is made on 3 ver-
dict being accepted by 3 Ct. & must be
reduced to writing & delivered to 3 adverse
party, or lodged with 3 Ct. within 24
hours afterwards.

Note, It is not now 48 hours aft-
wards exclusive of 3 Sabbath. See 3 Day 29.
Pink. 238. 1 Root 571.

For 3 form of motion in arrest of judgment.
&c. See 3 Bl. Appdx. II. No. 2.

Reference to pages 66. 92. 95. 134. 137.

Printed "Pleadings."
Litchfield 94th Dec. 7th
1827.

Bills of Exceptions.

3. A bill of exceptions is a statement of facts & of some interlocutory judgt. decision or direction in point of Law grounded upon them, annexed to & recd. for purpose of laying a foundation of a writ of error.

3 Bl. 372. 1 Bac. 325. 3 Bac. 136.
4 Bull. 120. 9 Co. 13. 113.

This statement consists of facts not originally appearing on record but wh. are a foundation of some interlocutory judgt. & wh. a party vs. whom it operates supposes erroneous, & is called a Bill of Exceptions because it contains exceptions to a interlocutory judgt. 3 Bl. 372. 9 Co. 13. 6. 1 Bac. 325. title "Bill of Excp^t."

This mode of grounding error was unknown at C. L. It was introduced into Eng. by Stat. Master 13 Edw. 1. c. 31. & wh. it was a creative & ref. 326.
9 Co. 13. 1 Reble. 324. Buller 310. 1 Bac. 325. 7.
Reble 168.

This st. is also probably adopted either by a Ct. of Justice or by some Legislative act in most of the States of the Union.

The object of a Bill of exceptions being to found a writ of Error, it follows that it can't be (allowed) filed or taken, except on a Ct. from wh. a writ of Error lies (i.e. not in Ct. not of record, (-in Eng.) & in Court, not in Probate Ct. nor Ct. of Commissioners. 3 Bul. 316;
1 Bac. 327.

This bill may be filed in all Cts. wh.
ex. judgments are to be reviewed by a writ of
Error, as in Eng. Com. Pleas, King's Bench,
Exchequer &c. But not in Chancery, it being
no Ct. of Record. And it has been doubt-
ed whether it might be filed in y^e King's
Bench in Eng. The proceedings being coram
Rege. But I conceive y^t. according to
principle it may as well be filed in y^t.
Ct. as in y^e Com. Pleas, 1 Bac. 96. 35 & 36 Skinner
2 Lewis 237. 2 Shaw, D. C. 147. 287. Bul. 316.

In y^e Statute it may be taken in all
those Cts. from wh. Error lies. 1 Wils. 289.

2 John. 107.

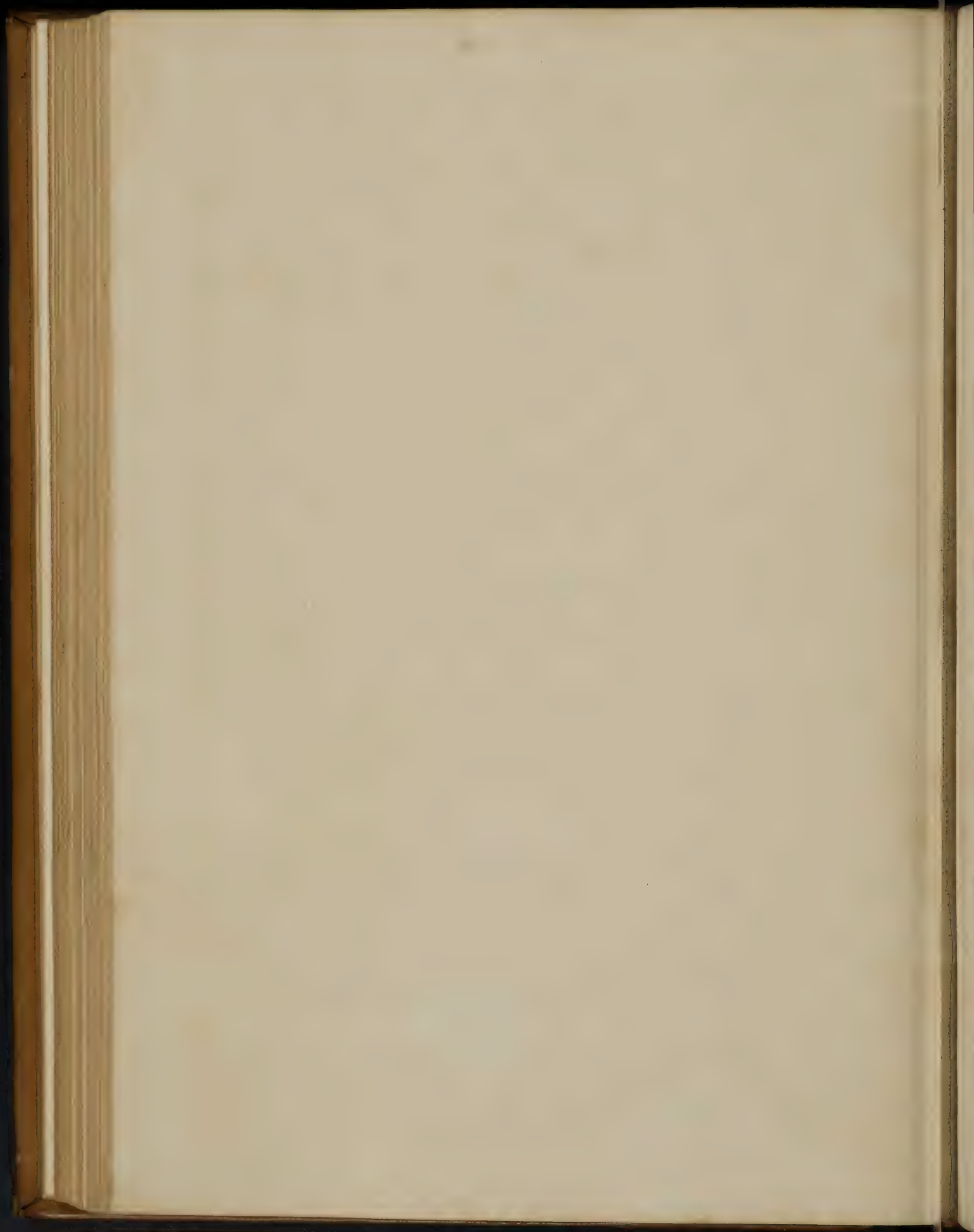
In Court they may be taken in y^e Supr. in
County, & Justices Cts. 1 Wils. 289.

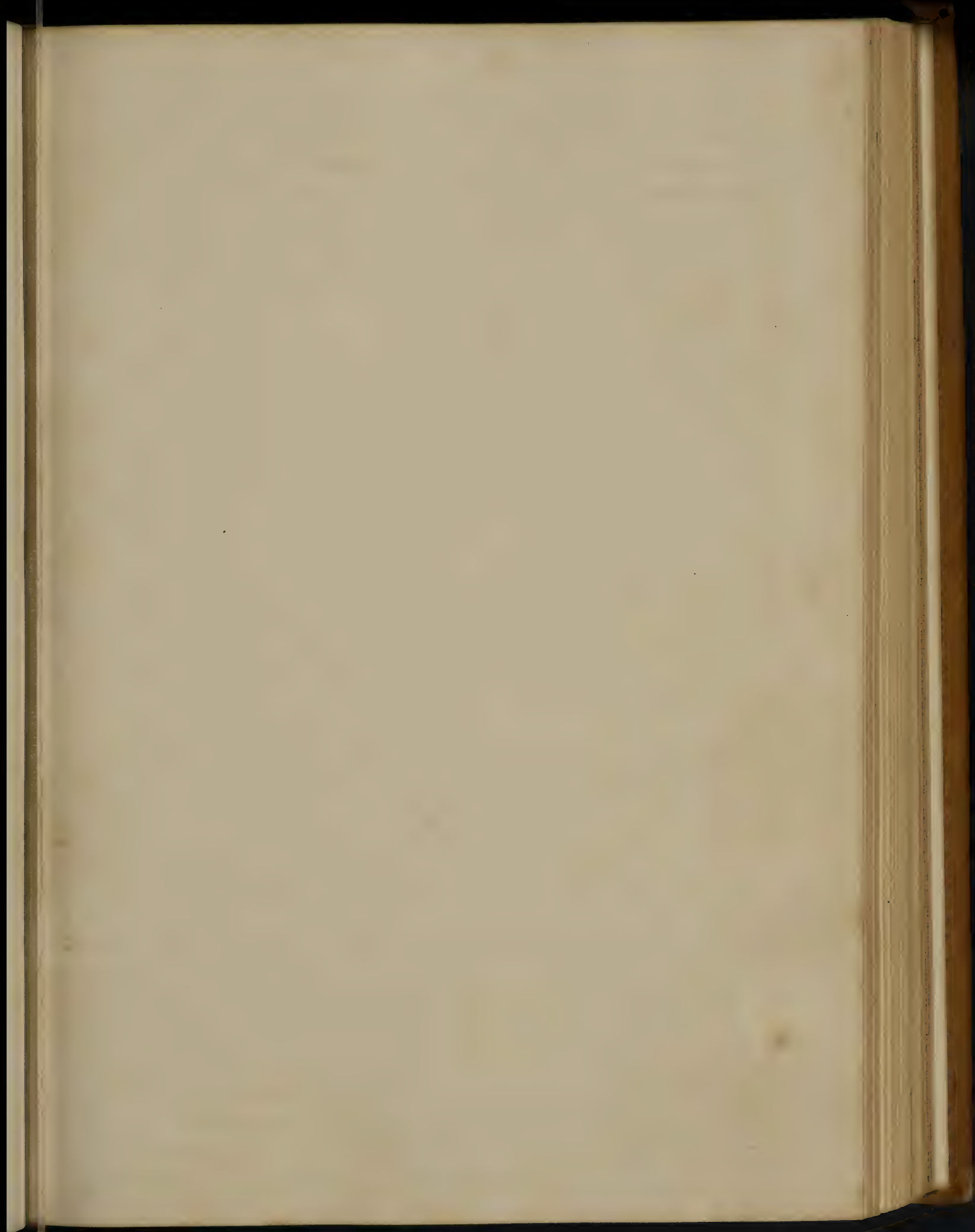
Overruling an offer to demur to Evid. prop-
erly made is an Error for wh. a Bill of ex-
ceptions may be filed. 1 Bac. 320. 480. 130.

2 H. Bl. 288. 2 N. H. 1. Bro. Car. 249, 251 9 Co. 13. 6.

Also a misdirection in point of Law by y^e
Judge in Eng. is a good foundation for this
bill. - tho' much more commonly remedied
by motion for a new trial, both here & in
Eng. in modern practice. 1 W. & A. 564. 5
2 H. Bl. 288. 2 S. Rep. 1.

So if evid. objected to is admitted or rejected,
a Bill of exceptions may be taken & filed
by y^e party vs. whom it operates.





It is also ground of new trial, & as a submission or rejection of evid. is a point of Law, it may be order of a Bill of Exceptions or of a new trial. But a more convenient, & now, more usual mode is to move for a new trial. 1 Bac. 326. 2 Lev. 237, 276. Hrb. 168. Bul. 316.

But if a judge admits a parties Ev. Bill is not allowed because he did not direct, nor to find upon it even if a evid. is it were a record (wh. is conclusive) & he did not tell a jury yt. it was so, or in fact took no notice of it. 1 Bac. 326. Bul. 316. Ray. 425.

8. So if overt is refused when in opinion of a party it shd. be granted. But in this case advantage is usually taken of a denial by entering a prayer of overt on a record by way of plea.

Or if it be ordered when it shd. be ruled, a bill of excepts may be filed.

The latter clause of a rule appears incorrect as in plea. ("Pleading" 105)

Doing case of allowing or overruling challenges to jurors; for this also is a point of law & may be subjected to. 1 Bac. 325. Just. 427. Ray. 231. Ray. 425. 6.

But on an interlocutory judgment relating to mere practice, this bill of Exceptions can't be taken. e.g. continuance of a cause, compelling party to plead, ordering or refusing

to order security for costs &c.

Is if any decision is discretionary with a Ct. it can't be a foundation of a Bill, for on these, error is not predicable, since in such cases there is no principle of Law involved, in a violation of which is essential to a ground of Error.

1 Mac. 327, Bull. 316;

Kimb. 41.

And it is a Genl. Rule yt. a Bill of exceptions can't be allowed to any decision of a Ct. yt. is entirely discretionary, for on such a judgment Error is not predicable. Hence a Bill does not lie for granting a new trial, for this is an application to a discretion of the Ct.

If a new trial shd. however be granted in a case in wh. or by a Ct. for wh. from the nature of it, it is not grantable, Error wd. be predicable of such a decision, as if a new trial shd. be granted in a criminal case after deft. is acquitted, or if a justice of the peace shd. grant a new trial.

Thus a determination of a Ct. must be entirely discretionary (i.e. such yt. the rules of Law wd. justify in determining either way).

In prosecutions for misdemeanors, as a deft. if acquitted can't be tried again, there wd. seem to be no use in a prosecutor's filing a bill of exceptions, but as a deft. if convicted may be entitled to a new trial, in many cases may he not file his Bill of Exceptions?

Bills of Exception are not allowed in prosecutions for treason or felony because (it is so.) & judge is a counsel for 3 prisoner & must see that justice is done him (An extraordinary exception since 3 bill is founded on an error if 3 judges on a supposed error.)

2d. reason is, that 3 lenity of 3 Ct. towards criminals will not allow them to be tried twice for 3 same offence.

The true reason is yt. 3 Stat. Westminster authorizing bills of exceptions does not extend to such cases, & so counsel gives 3 Ct. no authority to grant a new trial.

Note, there can't be a second trial & this is 2 reason they were omitted, 1 *Wid. 84.* *McC. Ners. Kellyng. 18.* *1 Keb. 327.* *1 Les. 638.* *1 Ray. 486.* *1 Bac. 225.*

It is now 3 practice of our Cts. to grant new trials in favour of 3 prisoner, & if this be 3 case it can see no reason why a bill of exceptions might not be filed in his favour

That it can't be filed vs. him, I shall observe more particularly on 3 subject of new trial.

2d. Whether allow an indictment for offences not capital? *Ray. 486.* *1 Wid. 84.* *1 Bac. 225.* *2 Hawk. R. 428.* *1 Leon. 3.* *1 Vent. 366.*

McC. Ners. 3267. *Kel. 18.* *Paul. 316.* *1 Les. 58.* *1 Wils. 207.*

7. It has been already allowed in Eng. on an indictment for trespass - from 3 last rule it concludes it is allowed. but not vs. 3 prisoner.

Regularly when a bill of exceptions is filed, 3 Ct. will not allow 3 party filing it to

make 3 same exceptions & ground of a motion
in arrest of judgment. i.e. will not suffer the
party to move in arrest on 3 point on wh. 3
bill was allowed. Having once given their
opinion & judge's remedy if then a writ of error.

This rule is sometimes perplexed with in
Banc. Regis. Phil. 266. 317. 1 Bac. 327.
2 Lev. 237. Kent. 366.

Note. Any motion in arrest on 3 same
point, must be meant a motion founded
on 3 Bill of Exceptions, i.e. 1 on 3 point
not on 3 record by 3 Bill.

Confined to Specific points.

The object of 3 Bill being to come be-
fore a higher Ct. a judgment on some col-
lateral point, it is regularly allowed not
to embrace 3 genl. merits of 3 cause, i.e. to
draw 3 whole controversy into a further exam-
ination.
1 Mong. & Bayly 56. 8 T.R. 549

A Bill may make out after judgment if con-
taining a genl. statement of 3 facts & agree-
ments. is inadmissible. This sometimes the ex-
periment is tried.

The Court if 3 Ct. below allow
it, 3 Ct. above will abate 3 writ of error.
Hillb. 228. 450. 77. Coop. 101. 1 B.R. 555.

Phil. 316. 17. T.R. 548. 2 Stra. 276.

It is not 3 proper course, a motion to quash
it.

The Bill is authenticated in Eng. by the
signature of 3 judges, or by one judge in Eng.
who appears in the Ct. above & acknowledges
his seal. 1 Bac. 325. 6. 1 B. & G. 32. Coop. 161. n.

In Court, it becomes parcel of the record in the
fact, below & is exemplified with the rest of the
record.

In Court, it is the convention to state
not only the interlocutory judgment, & the simple
facts, but also the grounds of exception which
were taken at the trial.

But in Eng. it need only contain a
statement of the interlocutory judgment, a direction
as to fact on which it was founded. If the
facts are truly stated, the judges are bound
to certify (i.e.) to sign it. Otherwise not.

And if they refuse to sign, a "Mandamus"
issues by Stat. of Winton 22 to order
them to sign. 12 Jac. 225. 346. 2 Lev. 237.
But. 316. Clowp. 151.

How. P.C. 116.

Qu. Does a "Mandamus" lie in Court?

It was formerly certified by a chief or pre-
siding judge. Now there is usually a mo-
tion made for a new trial by a rule of
the Supr. Ct. & propriety of which is ques-
tionable.

When to be tendered.

9. In Eng. the Bill itself, or at least the
substance of it, reduced to writing, must be
tendered at the trial. But. 315. Salk. 288.
Holt. 301.

In Court, the party must give notice of his
intention to file a Bill when his cause is
excepted away. 1 Root 569. a move to
file a bill, & the bill must be filed within
24 hours after the verdict is recorded in case

of trial by jury, & within 3 same time after
judgt. when tried by a Ct. (exc. Sundays) &
always before 3 rising th 3 Ct. a Lev. 276.
Root. 568, 550.

It bill to except if not itself a super- 10.
secede th 3 judgt. below, but merely in-
able 3 party to obtain claim a supersedeas
by allowance th a bill th error. 1220. 227.
12 Mod. 631, 609.

For 3 form th a Bill of Exceptions, see
Builder 317.

In Court. 3 form of thup.

Wash. County Ec. Bill of Exceptions.

gt. vs. B. action th Ec. - Plea th Ec.

On 3 trial th st. charge jolly. Ec. - signed

Ec. - Deft. Objecta Ec. stating 3 grounds)

Ct. decided in favour th 3 jolly. Now
3 deft. excepts 3 jolly 3 judges to certify
Ec.

When this becomes part of 3 record, it be-
comes part th 3 writ th error.

In Eng. it is no part th 3 record
th 3 Ct. below. 123. & 12. 12.

Writ of Error.

A writ of Error is a commission to judges or a Just. Ct. to examine & record wherein a judgment was given in a Ct. below, to assign a reverse it according to Law.

2 Bac. 187. 3 Bl. 417. Inst. 50.

Yelv. 217.9.

In Eng. & writ of error does not summon & Just. in error to appear &c. It is not being an original writ, he is summoned by a "scire facias ad audiendum errores".

2 Mac. 206.7. 3 Bl. appdx. 2 Mac. 218.

Writ, in Court. & Just. 276. Here it is an original writ summoning & Just. in error to appear & hear & assign a reverse & the error assigned &c.

When founded on a mistake in & legal opinion of & Ct. below it is for & reversal of such judgments only as are reversed on some points of law appearing on & face of & record, but not to rectify an error in & determination of facts or & weighing of evidence.

1 Roll. 386. 2 Mac. 187. 5 Com. 256. Rest. 74. 3 Bl. 407.

Pro. C. 23². Owen 142. Hay. 35. Leo. 233.

By & term "writ of Error" with more, is meant usually one of & above description (i.e.) one founded on an error in law & apparent on & face of & record. 2 Bac. 187.

3 Bl. 407.

But there are writs of Error founded on errors in fact (i.e.) on errors not appearing on &

record below.

If on reversal, Jtts. in error can recover & be restored to any thing in y nature of damages, or any thing real, or land, it is considered in y nature of an action, & of course a release of all actions will bar y writ.

24th Nov. If its object is only to recover of reversal & costs incurred in y Ct. below. Here it is not considered as an action & consequently a release will not bar it.

Just. 286. b. 2 Bac. 187. 225.

8 Co. 152. 1 Roll. 188. 2 Roll 405.

Coram vobis.

There is another species of writ of error, founded on matter of fact which the record, i.e. not appearing on y Record.

This lies to such Cts. (only) of Error, as try questions of fact, but not to others) such as Banc. Reg. or even to Parliament in Eng. - But not in y Excheq. Chamber for y Ct. has no jury. (Bro. J. S. 1 Just. 201. 2 Lev. 38. 2 Bac. 215.)

Or such a writ may be brought in y same Ct. in wh. y original judgt. was rendered, & it is called a writ of Error "coram vobis."

This is not strictly writ for an error of y Ct. but consists of an error in some extrinsic fact, e.g. judgt. vs. a mere adv. alone y Ct. not knowing of y coverture. - The barons & jems. may join in a writ of error to reverse the judgt. either before y Ct. yt. rendered it or a higher one.

Also if ss. an infant with his having ad-

variance by Guardian in *Prochein ami.* 746. 58.
Co. J. 10. Nibb. 116. Co. J. 5. Carth. 122. 14.
 149. 3 Bac. 157. Hallk. 500. 2 Roll R. 53.
 2 Com. 177. 1 Vent. 207. 5 Com. 286. 300.
 2 Bac. 198. 217. 3 80. 228. Carth. 637. 338.

But if Ct. on information (granted) will al-
 ways appoint a guardian ad litem.

So if inf. disp. indecide title & judgment.
 is rendered by Ct. not knowing of this matter.
 4 Bac. 143. 2 Bac. 145. 3 Bac. 218. May. 58.
 5 Com. 286. Nibb. 222 Carth. 538.
 Stra. 629.

If y. shuff. returns yd. y. original party
 is alive, he may come into Ct. & plead in
nulla est erratum. Carth. 119.

So also if a judge who gave judgment was
 interested in y. cause it is an extrinsic pro-
 vider to error. 5 Com. 177. Stra. 629.

So if one party & recovers as exact: of
 G. H. the G. H. being alive - a writ to
 error will lie to reverse y. judgment, either be-
 fore a higher Ct. or coram vobis.

5 G. R. 129. compare with 5 Com. 177. 639.
 Roll 748.

The same if said as such, I have no doubt
 that yd. judgment in this case may be reversed in
 both ways.

A writ of error will not lie on a judgment
 of a Ct. not of record, for y. writ is founded
 on y. record. e.g. County Ct. in Eng.

2 Bac. 174. Co. Lit. 208. b.

Then on a decree or sentence of Chancery in Eng.
 for this is not a Ct. of record, Remedy in Eng.

by an appeal to the House of Lords. In civil
error lies in name of Chancery by Stat.

But on a judgment given in the Petty Bag of-
fice. it may lie in error to B. Reg. 413-68.
proceeds according to C. L. & 4 a Ct. of re-
cord. 2 Mod. 570. 1 W. L. 58-9. 2 Bac. 194.
1 Roll 777. 1 Bul. 251.

It lies on a judgment of non suit & also
by "default". 1 Day 52. a. 1 Tra. 235.
1 Roll 777. 1 H. 13. 452.

There are two species of error on which this
writ lies. 1. In matter of Law apparent
on the face of the record, & 2. matter of fact
not thereby appearing.

Still however assigning error in Law & in
fact together is ill. 2 Bac. 217, 18. 5 Com. 300.
1 Sid. 92. 187. Leon. 105. Reg. 201, 59.

1 Vent. 252. for they
require diff. decisions, ~~fact~~ by the jury -
Law by the Ct. 2 Bac. 217-18. 1 H. 13. 452.
1 Com. 300. 1 Sid. 92.

But tho' the matter of fact & of Law are 16.
blended in the assignment of errors, yet if
softly stated "in melle est errorum in recordo"
the loss of advantage of a double assignment.
& waives all exceptions. In a plea to this
kind gently confessed & error in fact, & there
is room for but one trial & perhaps not
that, for the confession may conclude the
necessity of it.

If deft. wd. take advantage of this double
assignment. he must remove. 2 Bac. 218. 209.
257. East. 338. 9. Hunt. 252. 1 Leo. 6.
8 Mod. 113. 206. 1 Halk. 268.

But it is sd. yt. a genl. remove. wd. reach
y subjects tho it is called duplicity, in a
suit of error, & y reason of duplicity,
in a suit of error is not within Stat.
27 Eliz. wh. requires special Com. for du-
plicity. 1 Bac. 956. 2 Bac. 218. East.
338. 9.

If y unsuccessful party shal. assign in-
fancy & covtenance both at once, it wd. be du-
plicity, for either of them is sufft. to
arrest judgment. & on each there shd. be
a distinct issue as there always must be
for every error in fact.

As assigning several errors in fact amounts
to duplicity. 5 Com. 300. Fitzh. 30. 20.
Comm. D. Pl. 3. 15.

17. Verum. where several errors in Law are
assigned. Duplicity is not predicable of
more matter of Law, for there can be
but one issue & it reaches thoz whole
record. Comm. D. Pl. 13. 15.

But for every error in fact assigned
there must be a distinct issue, for y
former requires several distinct answers
& issues the latter does not. "In nullo est
verum" answers y whole.

If an error in fact be well assigned the
deflt. in error can't prevail in the traverse
it. It may plea of "in nullo est erratum"
confess it. Yelv. 57. 1 Sider. 73. Ray. 59.
231. 2 Bac. 218. Thus p'ty. in
error p'ces. he was an inst. & deflt. p'ces. "in
nullo est qd." Deflt. &c. confess it.

Aliter if not well assigned, then such
a plea does not confess it, as if a assign-
ment. contradicts a record or alleges a fact not
assignable in error. Cro. J. 12. 29. 529. Ray. 251. d.
1 Root. 758.

Super. Ct. of Cont. decided yt. if p'ty. as-
sign p'cess. errors in law, & add error in fact,
in inst. a assignment. If a error in fact does
not vitiate a writ, it being considered as
surplusage. Dist. 27. 20. This was on special
demurrer.

In another case they ordered a fact to be
struck out, & reversed for a error in law.

This was done by a Ct. judicially.
It was indeed a strange proceeding, for if
a deflt. had moved to amend he d. not
have done it; amendment. in writs of error
not being allowed. 1 Root. 62.

In assignment. If any error in fact wh.
contradicts a record (i.e. wh. contradicts
any statement in a record or any thing
implied in it, is not good, as if p'ty.
allege a Ct. did not sit on a day sta-
ted in a writ. Or if he allege yt. the
judge below did before just. rendered.
Or that there was no appearance of p'ty.
below, wh. appears on a record.

In such cases a plea "In nullo est erratum" is a good plea, for it does not confess
y facts: 1 Roll 757. Cro. E. 12. Cro. J. 568.
Cro. E. 569. Hobt. 204. Plak. 262. Ray. 231.

The genl. rule is y^t. deft. can't ap-
pear for error wh. he might have pleaded
in abatement, in he did plead in abat-
ent. & his plea was overruled. He is deemed to
have waived all advantage. Caith. 124.
6 D.R. 766. 2 H. B. 267. 299.

When error is assigned, y^e proper conclusion
is "hoc est paratum verificari".
Com. D. 56. 5.

It is analogous to y^e pleading non mat-
ter in pleadings. Caith. 587. 1 Bac. 215. There is
an earlier case in N. 10. 58. where it is sd.
it ought to conclude to country. (not in
case of deft. sometimes 2. 1. 1.)

I have sd. that for error in fact, error
coram vobis will lie. Plak. 300. 1 Roll.
4 Bac. 39. 747. 2 Bac. 215. 18. as if one swears
& recovers as executor of J. S. he being still a-
live. 2 Lev. 55. Hobt. 207. Cro. J. 5.

But this rule does not hold when y^e Ct.
rendering judgment, can't try an issue in fact.
then it must be hot to some higher Ct.
e. g. judgment of Ct. of Excheq^r Chamber wh. can't
try an issue in fact. it must.

Again, if error assigned be error in law
it can't be coram vobis. for it wd. refer
y error to y same Ct. wh. committed it.
It must be hot to some higher Ct.
1 Lev. 149. 1 Sidm. 208. 2 Bac. 215. 1 Roll 749.

In one of these authorities Lev. or Roll a deficient rule is laid down.

It however is not an error of J. Ct. itself, but of some officer of J. Ct. as Clerk. & even when will be for error is not properly Jt. of J. Ct. & upon there can be no improbability in referring a question to them. e.g. J. Ct. make proper judgment, but it is wrongly entered by J. Clerk.

1 Roll. 346. Fitch. 21. 2 Bac. 215.

20/02. 181.

As to the time for bringing over, the writ or interlocutory judgment, by the old rule it must be brought until final judgment for the party may prevail on the merits & thus preclude the necessity of a writ of error. 1 Roll 749.

This Rule in Engd. is now qualified, the writ of error may be before final judgment, but must be returnable after that time.

Comm. D. tit. Amend. to R. C. 4. 1 Term 235.

2 Kieble. 308. Latch. 133. 1 Thide. p. 104. 566.

12 R. 280. 1 Tra. 807. 1d. R. 1531. 2 Bac. 199.

In Cont. the rule remains as formerly, & there will be some absurdity in adopting this qualification: for it must appear in the writ that final judgment has been rendered, which cannot be if the writ issues before the final decision.

The Court have decided yet, an agreement of the parties to dispense with final judgment, shall not supersede the rule. 1 Root. 180-1. 290.

When a judgt. is joint vs. several, all must
join in a writ of error. This rule is founded
on a principle yt. all who are aggrieved
or suffer wrong shall join to remove it.
2 Bac. 198, 2. Leath. 7. 8. 367. 1 Roll. 475. 3 Mod. 134.

If however, one of 3 parties will not
prosecute in error, he may be summon-
ed & served. If this do. not be done, one
might collide with 2 other party & pre-
vent justice from being done.

But, if Court. formerly reversed a judgt. as to
some of pts. & affirmed it as to others.
This case was an action for 14 pts. & Batby.
vs. 3 or 6 pts. some of whom were infts.
all pleaded by 4 pts. & were all subjected,
all joined in 3 writ of error. The judgt.
was reversed as to 3 infts. & affirmed as
to 3 others. R. 114.

But 3 to 1 rule is otherwise. 2 Bac. 198. 228.
1 Roll. 776. Cro. J. 289. & is correct in principle.
If 3 infts. had not been parties 3 damages
might have been left.

By 3 Eng. rule, if 3 party of 3 judgt. are
separate, it may be reversed up to part
only, not as to the parties, but as to the
subject matter, (e.g.) In trespass of certain
kinds, 3 pts. is entitled to damages but
no costs. If in such case there be judgt. for
cost & damages, it may be reversed up to costs
only. 1 H. 189. 2 Do. 808. 3 Brev. 2022.
R. 138.

Who may bring a writ of Error.

Genl. Rule. No person can bring a writ of error except a party or privy to the first judgment.

The party may be counsel, & on the death of the party, his heir, executor or administrator, but the privy must be a privy in relation to the subject matter of the judgment. e.g. If the subject-matter were a realty the heir must bring the writ of error, for he only is privy to the realty & not the executor. But if the subject-matter be personal the writ in error must be brought by the executor or administrator he being privy to the personal estate.

The heir is privy in blood & on the death of his ancestor the real estate reverts to him.

The executor is privy in representation and must administer the personal estate.

2 Pol. 355. 2 Bac. 195. 6. 1 Sidw. 317.

280. 56. 1 Leon. 261. 1 Roll. 747. 48. 755.

Who are privies see "co. 42."

Again it is a rule yet no person who a party can bring error in the judgment intended to be reversed is to his disadvantage.

Thus if one of several jointly obtain judgment, he can't join to reverse the judgment, vs. the others, they must bring it alone, for he has obtained all the law allows him, viz. his costs.

This is not inconsistent with the former rule, for they are not strictly parties (e.g.) action vs. J. & B. B. has judgment. B. is no longer, in the eye of the law, a party to the suit vs. J. & can't join to reverse the judgment, vs. J.

Hob. 70. 8 Co. 39. 5 Co. 39. 1 Lev. 210.

Utia. 892. Coop. 425. 2 Bac. 195. 199. 220.

This last rule, however, is not universal. There are cases in wh. 3 party prevailing may reverse & jdg't. as when 3 error, being 3 fault of 3 Ct., allow 3 manner of jdg't. (e.g.) omitting to answer 3 party vs. wh. jdg't. is rendered when he ought to be answered. This is allowed for sake of introducing regularity in jdg't. *Harlow, cap. 51.*

Ho if on a verdict giving damages & costs, jdg't. is rendered for damages only. 8 Co. 59. 5 do. 38. 1 Roll. 759. *Holo. 107. 11th. 971. 2 Roll. 189.*

The truth is in these cases 3 jdg't. is not complete but defective in itself. He br. out pt. wh. is necessary to complete it & make it perfect. *Holo. 107. m. 7 11th. 189.*

Ho 3 P'ty. may reverse a jdg't. but by himself before a Ct. having no jurisdiction of such cases. 2 Branch. 120.

4 writ to error when only allowed, & proper writ entered becomes only a supersedeas not always.

When a supersedeas.

By a supersedeas is meant a suspension of 3 right of 3 party prevailing in law to take out execution, or to proceed under it taken out. *and. post.*

In Eng. it seems to have been formerly holden yt. 3 more showing of 4 writ of error to 3 adverse party, operation as a supersedeas, till 4 days had expired, yt. being 3 time

allowed for obtaining from 3 Clk. of Error an allowance of it. (1 Febr. 295. 1 Roll. 492. 2 Febr. 129, 130, 2 Dec. 210. 1 J. R. 280. 1 B. & D. 478.

But 3 allowance of a writ of error is a supersedeas for 4 days only after judgment is signed, y^t. being allowed for putting in bail in Error.

If bail is then put in, 3 supersedeas continues; otherwise not, & 1 J. R. 280. & error may be taken out & proceeded upon.

Bail in error is intended as security for deft. in error for satisfaction of 3 original judgment, if affirmed.

There is no supersedeas until bail is entered; for were it not so the ex^r might throw a change in 3 circumstances of p^lty. in error, become of no use to 3 deft. in error.

In Eng^d. 3 recognisance of Bail is with two securities, in double 3 amt. of 3 judgment. - this is by st. 3 Jac. 1. 82 st. 4. chap. 2. 1 Bac. 212. 3 Bac. 672. 673.

In Law, if sufft. bail in error is given without income, a supersedeas by being served on 3 deft. in error, & not with service. 2 Doug 370.

It has been supposed y^t writ of error, with bail, may be effectual to reverse judgment. It will not however supersede it. The object of bail is to secure 3 payment.

If judgt. is affirmed, & costs, & I see no reason why there shd. not be a reversal since yt. is secured by 3 power of executing 3 judgt. below. (Bro. J. 350 & Mac. 622.3.)

Hence if a writ of error issue after ~~the~~ error in 1st hand of Jst. it is a supersedeas if served on time.

25.

There was formerly no rule settled in Court as to 3 time of pleading in abatement. & writs of error. In 1816 3 Ct. of Errors established a rule in conformity to 3 rule of Sup. Ct. as to other pleas in abatement. (i.e.) a pleading of 3 Ct. on 3 2^d day of 3 term. 2 Court. Reports.

If a writ of error abate or is discontinued by neglect or act of 3 Jst. he cannot have a second supersedeas, or another writ, for if so 3 Jst. might supersede indefinitely. The law allows one supersedeas only.

If 3 Jst. is nonsuited he shall not have a 2^d writ (i.e.) if he voluntarily abandons his plea. This is at C. L. but is not 3 practice in Court. Black. 263. 1 Pick. 658. La. R. 97. Comb. 14. 395.

Plita, if it abate by 3 act of God as death of Jst. or inevitable accident, or death of C. Justice.

On what principle does it abate on 3 death of C. Justice?

The reason is yt. 3 commission is directed to C. Justice or to him & his associates so that

on his death, & commission fails for & associates
are only known, as being his associates?

1 R. 6. 658. 686. 14th. 208.

Writs of Error are not Amendable except
for & purpose of conforming them to & rec-
ord in & Ct. below, - and this by St. & Geo. 1.

By C. L. they are not amendable in
any case, for they are not favoured in
law. 5 Mod. 16. 69. Halk. 49. Carth. 220.

Comm. Dig. amend. 2. C. 4. 2 Bac. 202.
209.

In Court. amendments. are allowed for &
same purpose & & Ct. have ordered & record
to be brot. up & compared.

A writ of error does not abate by & death of
deft. in error. His representative may be summoned
by scire facias.

But it does abate by & death of Plff.
This is by virtue of St. 4 & 5 Anne; for by
C. L. it wd. abate in either case.

1 Vent. 34. Halk. 264. 14th. 208.
Carth. 226.

Not a matter of right.

In Eng. & in Court. a writ of error is not in
all cases a matter of right, for in Eng. it
is to be allowed by & Ct. of error in all cases
before it can be operative; - & in Court. the
judge applies to, examines, & reasons, & if find-
aloud he is bound not to sign it.

1 Roll. 492. Halk. 264. 326. 2 Bac. 210. 4 Bac. 681.

Debt on judgt. wd. be sustained notwithstanding &
writ of error brot. to reverse & same
judgt. - for that & exco. is suspended. the

settle or duty remains & is as binding untill
judgt. is reversed as 3 most perfect judgt.

7 T.R. 458. 3 Wils. 345. Ray. 100. 8 Co. 152. a.b.
2 Mac. 111. 1 Leo. 153. 1 Roll 742. 2 Roll 490.

What then is 3 consequence of recovery is
not on 1st judgt. & 3 same judgt. is
reversed? The latter judgt. is reversed
by necessary consequence.

The Ct. however may in such cases
stay proceeding untill 3 decision of the
cause in error. 2 T.R. 78. 2 H. Bl. 372.

If a third person obliges himself to pay
whatever shall be recovered vs. 1st. & recov-
ery is had vs. 1st. & a writ of error brot
by 1st. to reverse judgt. this third person
may plead full 3 pendency of 3 writ of
error in bar of 3 action brot on 3 obliga-
tion. (e.g. J. D. obliges himself to pay
judgt. obtained vs. 1st. This rule ap-
plies particularly to bail. 2 H. Bl. 374.

When execn. is fully executed a writ of
error is no superaddit. It does not un-
do what is already done. 1 Kent. 30. 4 Mac. 620.
Fitzh. 237.

Do-ile property of debt. has been taken and
sold. 1 Kent. 30. 4 Mac. 684.

In these cases there have been contrary op-
inions. If goods of debt have been taken
but not sold & a writ of error issued, it
is so. 3 Wils. can't sell. But this seems
not to be law for 3 process of execn. if
commenced must be perfected, it being com-

siderea in law indivisible. 4 Geo. 6. 1 Vent. 255.

Walk. 147. 323. La. R. 990.

Bro. G. 597. 4 Bac. 684. 2 Day. 370.

In law this point is thoroughly examined & Eng^l authorities cited & Ct. unanimously determined yt. if goods were once taken they may be sold.

Secondly to practice of Court. erroneous judgment. is as liable to be, as final judgment. (i.e. bail in original action) If then judgment. in original action for judgment. bail can't be subjected tho judgment. be reversed.

This rule must be founded on construction of Court. It is contrary to Eng^l rule. 1 Root 567. Court. Str. 526. 419.

Bro. L. 945. 1 Bac. 212.

The Eng^l Cts. do not consider judgment determined until a decision on writ of error; but the Cts. of Court. do, so far as respects bail.

If plaintiff in error does not assign errors, judgment. is not affirmed nor is it reversed for there is no proceeding on writ & judgment. below is not affected.

Hence if plaintiff. does not assign errors, judgment. is not affirmed nor is it reversed, for there is no proceeding on writ, & judgment. in error can't recover costs. He must have recourse to recognizance. 2 Ric. 52.

1 Vid. 294. 2 Bac. 216.

This is another rule yt. will not apply in our practice, for here the error must

be assigned to form a writ, they must appear
in a writ, & indeed it is no writ without
them.

If a writ, having assigned error, becomes
non-suit, there is no judgment except that
defendant recover costs. & a judgment below is
mainly unaffected.

It appears already that a reversal of judgment
before verdict & proceedings under judgment
in some cases - in others not.

The rule on this subject laid down by Lord
Coke is not very intelligible. It is that
"collateral things executed are reversed,
i.e. annulled by reversal; - collateral things
executed are not reversed by it."

(i.e. avoided #)

8 Co. 142. a. b.

E.g. if lands or goods have been taken by
a sheriff in writ by him. They must be re-
turned by the sheriff on reversal to the court.

In this case judgment annulling proceedings,
a collateral thing being executed.

Again if goods were delivered to a sheriff
in satisfaction of judgment, they must be
restored, for a very good reason if the writ itself
is destroyed. The collateral thing is executed.

12 Bac. 231, 2370. 1 Roll 778.

Opel. 179. Cro. J. 246.

So person's right is affected by reversal
but that of a sheriff & a bail.

But if goods taken have been
sold to some third person, some stranger, a
purchaser will hold them notwithstanding

of reversal (i.e.) when the Sheriff is required by law to sell, for the law will not vacate an act authorized & enjoined by itself.

This is a collateral thing executed, & a third person is here interested. 3 Leon. 89, & Co. 143. Bro. E. 278.

2 Bac. 211-2. Yels. 128.

The party however may have his remedy vs. the other for the amt. of damages sustained by the sale.

& Co. 143. a. Bro. E. 278.

Again if one, taken on original execution, escapes & action is brought vs. the Sheriff for the escape, by reversal of action is gone, & "null. tiel record" may be pleaded to it, for by the reversal the former record is virtually destroyed.

But if a recovery is had vs. the Sheriff before reversal, the judgment must stand, for here the collateral thing is executed, he can not plead null. tiel record, for there then was a record. & Co. 152. a. 1 Saunders. 38.

What then is the relief of the Sheriff, or has he no remedy? His only remedy is by Adita Quercia vs. the effect of the execution: but this does not affect the judgment. Bro. J. 640. 2 Bac. 241. 2.

But suppose property taken & sold according to Law at an appointment, into the hands of the party in whose favour the erroneous judgment was, & he sells it after the erroneous judgment is reversed, must the property be restored to the party in error? It seems it must be.

(See 1 Maddox Chy. 131.) & Co. 143. a. Bro. J. 278. 246. Yels. 178. 9. 108.

The purchaser must look to his grantor's title & abide by it, for he has & means of knowing what y^e title is, & his remedy must be on y^e grantor's covenant to warranty of title, express or implied if any, & if not, & no fraud practiced on him in y^e sale, he must bear y^e loss.

And if a ~~stranger~~^{shff.} sell property even to a stranger when he is not bound by law to sell it, it is restored on reversal. 2 Bac. 202.

E.g. case of goods of another taken on "comp. ias ul legalum" where y^e shff. is not required to sell but to keep them for y^e king.

Where y^e sale creates no title, the sale not being warranted by law. Cro. E. 278.

1 Roll 778. 3 Co. 90. 3 Bac. 278.

Stat. of limitations as to writ of error in Eng. confines it to 20 yrs. from y^e time of entering judgt. or 1 Root 54, 7 record. 2 Bac. 200.

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5 Warr. 290 Stra. 837. St. 10811 W. 1811

When judgt. is for scft. in error he recovers his costs on y^e suit in error, if for y^e scft. no costs are taxed, for costs are considered as penal. #

In W. L. it is limited to ten yrs. & by st. of Limit. is three yrs. from y^e time of entering judgt. 1 Root. 54.

But if in this # case y^e judgt. in error puts an end to y^e suit (as it will genly. if the scft. below be scft. in error & prevail) he recovers costs on y^e original suit (i.e.) costs under y^e name of damages in y^e Ct. below.

If J. judgt. in error is for J. pth. in error
i.e. if judgt. in error does not put an end
to the controversy, as it will not genly. if
pth. below is pth. in error & prevail, the orig-
inal cause may be entered for a new tri-
al reversing J. original judgt. or remanded
to J. Ct. below for that purpose as the
case may be.

And if he finally prevails he will
recover in Ct. of his costs - except on suit
in error, but if he does not proceed to
further trial by entry he is not entit-
led to costs. 1 Com. R. 150.

If pth. in error has pd. any thing on
erroneous judgt. he may recover that sum as
damages on reversal. If not no dama-
ges are received by him, except for costs
below.

But on reversal pth. recovers as damages
the costs wh. he ought to have recovered be-
fore, viz. he has a further trial & if he
has, his costs await J. final determination on
judgt. If he has a right to prosecute
further & does not, he loses all costs; &
recovers only what he has been compelled
to pay on J. erroneous judgt. Com. R. 150.

In common cases allowance of interest on
J. original judgt. is, on judgt. of affirmance,
discretionary with J. Ct. in Eng. 2 H. B. 284.

1 B. & O. 29.

It is not, however, allowed in Eng. in debt
on recognizance vs. Bail in Error. 2 J.R. 57. 78.
Long. 525.

I suppose 3 reason to be, yet 3 bail is
not within 3 Stat. It is however 3 rule
of practice to allow it in all common
cases.

If 3 original Jdgt. reverses a Jdgt. be-
low wh. was vs. himself in a case where
he has a right to prosecute further and
does not he loses all his costs; for his
not pursuing his claim it is evd. that it is
a weak one.

Thus if Jdgt. Decr is alleged in sufft. on
remover, & he brings error to reverse, &
reverses it, if he does not prosecute the new
action he loses his costs, if he does, & whole
costs follow 3 final Jdgt.

Every state, however, has its own rules as
to costs.

Upon a Jdgt. of affirmance in error, 3
prevailing party is entitled to interest
on 3 original Jdgt. in 3 discretion of 3
Ct. for 3 writ of error has suspended 3
Jdgt. & delayed 3 collection of it & in-
terest ought to be allowed.

The Stat., however, leave it discretionary
with 3 Ct. In Cont. it is universally al-
lowed & in Eng. I believe genly.

Ut. Cont. - 1 B. & J. 129.

Cases exemplifying the effect of an affirmance or reversal of judgment on a writ of Error.

Court below - 94. vs. 13.

Case II. Judgment below for 94. to recover of 13. \$20 Damages & \$10 costs. Judgment reversed for insufficiency of Decree. Before A. has collected any part of his execution-judgment above is, that 3 judgment below he recovered & 4 13. recover of 94. \$10, & amt. of his costs incurred by 13. in 3 Ct. below in original action.

But no costs are recovered by 13. on 3 writ in error.

Case III. The case as before, except 94. H. had collected & amt. of 3 exec. viz. \$20 Gold. Debt. & \$10 costs; Judgment of reversal as before & 94. 13. recover \$50. viz. \$30 p.c. to 94. on 3 erroneously judgment & \$10 costs sh. 13. ought to have recovered in 3 Ct. below.

Case IIII. Judgment below in favour of 94. affirmed in 3 Ct. above. Hence 3 judgment above is 94. 3 judgment below he affirmed & 94. 94. 3 Judgment in error recover his costs in 3 writ in error. The judgment below is again operative. Judgment on 3 first judgment is also allowed in 3 Ct. in their discretion think proper & exec. issue for it. Stat. Court. Practice is to allow it if course I believe.

Case IV. Judgment below in favour of 13. 3 Judgment below. H. by writ of error reversed

the judgment. The judgment in this case is merely a judgment of reversal if a Ct. above is competent to try a question of fact; a B.R. or Sup. Ct. in Cont.

94 on a judgment of reversal entered a cause in a Ct. above for trial & on final judgment if he bravely recovers, together with his debt and damages all his costs wh. occurred before a judgment of reversal as well as those wh. have accrued since. But he recovers no costs on a suit in error. If A. had paid a costs taxed vs. him in a Ct. below he wd. recover yet on judgment in error of damages. But A. must enter his action for trial at a time judgment of reversal is rendered if he enters it at all.

(Root & S.)

Case V. Case as before, but a Ct. wh. reversed a judgment not competent to try a cause, it must be entered in some other Ct.

Case VI. Demurrer in a Ct. below to the return, return found insufficient on writ of error judgment is reversed.

Here it wd. generally be allowed for A. to enter for trial since his return is adjudged insufficient & a Court below never wishes to enter for trial, still a plaintiff may enter so yet if his return may be helped by amendment he may have an opportunity to do it. (Prescribed by Sup. Ct.)

Case VII. Return in a Ct. below adjudged insufficient, reversed on writ of error. Here

gt. enters for trial in 3 Ct. above, if 3 Ct. can try 3 question of fact, for he has a good writ. The merits have not been tried since 3 Ct. above have rendered only judgt. of reversal not a *Quod Recipere*, & 3 Ct. above can't on judgt. of reversal ascertain 3 damages.

Case VIII. Plea in Bar demurred to below & adjudged sufft. Judgt. reversed & enters for trial, for as yet there is no judgt. for gt. to recover & for aught that appears on 3 face of 3 record he may be right to recover.

Case IX. Plea in Bar alleged insufficient. below Judgt. reverses above. If gt. shd. enter it wd. be to no purpose. B. says not wish to enter for his object is only to defend & gt. object is obtained by 3 reversal.

Case X. Plea in abatement. Judgt. below gt. 3 plea abate. Judgt. reversed above. Pth enters for trial, for he has a good writ, & has a right to prosecute to final Judgt.

Case XI. Plea in abatement, as before, Judgt. of Respondent Auster in 3 Ct. below. Reversed in error. gt. can't enter for he has no writ. May he not enter if his writ can be amended as in case VII.

Case XII. If error is not for 3 admission or rejection of evid. pth below may enter

for trial on reversal whether he is in error
as to a deft. & whether a judgt. on reversal
is for or vs. him. E. G. 9th & witness was
excluded below. On a bill of exceptions a
judgt. is reversed, & entry for trial, here
he is still in error & a judgt. in error is
in his favour.

13th witness was excluded below. Judgt.
reversed, then 13th is still in error & judgt.
is in his favour, yet 9th may enter for
trial if he pleases, for he may be proved
notwithstanding 13th witness.

Note. In all 3 cases above in wh. a origin-
al 13th is supposed to enter for trial on
a reversal to judgt. & Ct. above is sup-
posed competent to try 3 questions of fact. If
it be not 3 cases 3 questions of fact. If
to 3 Ct. below, & then 3 final trial is had.
Vide 4 & 5 case supra 9th Cont.

When a judgt. in error puts an end to the
litigation between 3 parties, 3 action is never
entered in 3 Ct. above, - nor remanded for
trial to 3 Ct. below.

The litigation is always ended by
affirming a judgt. But a reversal in
many cases does not terminate it.

Litchfield April 11th.
A.D. 1827.

9 New Trials.

A new Trial requires no definition. The mode of obtaining it in Engd. is by motion made in Bank (in 3 Cts. of Westminster for instance) & not at N. Pri. where 7 first trial was.

Granting a Rule to show cause on 7 motion, suspends 7 judgt. (i.e.) prevents it from being entered up, & 7 reasons 7 7 motion are afterwards discussed in Bank.

It may be granted at any time before judgt. but never after. Doug. 760.

When this country was first colonized new trials were not known in Engd. The course was by attainr. - so yt our Cts. having no law to direct them made their own rules.

An application in genl. is considered as an application to 7 discretion of 7 Ct. Exg. 46. they are not usually granted when it appears, yt. substantial justice has been done, tho' some mistakes may have intervened. 2 Wils. 306. Bul. 326. 5 East 451.

4 D.R. 419. 10 Mod. 344. 229. 3 B.R. 341. 1. 13. 2. 2. 38.

After when a point is reserved by 7 judge. In such a case 7 Ct. consider itself in 7 relation to a judge at N. Pri.

13. 5. 38. 259. or 38-9. 338.

Hence when ground for reft. on what is called a hard case, or a prosecution under 7 game

laws sh. are odious, the Ct. will not grant a new trial even tho. there were an error as to admission or rejection of evid. or another mistake.

1 D.R. 409. When La. Hen. you speaks of a presumption raised by the facts contrary to evid. in sh. case no new trial if verdict is according to equity & conscience.

3 Bl. 391-2. 2 Mot. 118.

644. 1 Burr. 394. 399. 2 D.R. 405.

1 B. & P. 388, 389.

This rule does not apply in all cases. Hence not granted to deft. to let in evidence of usury, infancy, coverture, stat. limitations, or any unconscionable defence in genl.

1 B. & P. 52. 454. 1 B.R. 35.

Other. 1242.

As to stat. of Limitations there is some question. See - 1 B. & P. 228.

³ D.R. 124.

On the same principle the Ct. can impose such terms as they please on the party to whom it is granted as admission of facts, production of books papers &c. - In Eng. examination of witnesses in form 8 3 Bl. 391.

7 D.R. 529. 1 Halk. 248. 2 Lev. 160.

(Error is not predicable on the decision of Ct. in granting or refusing new trial it being discretionary - this shd. come in below.)

17. The legal grounds of application is any thing sh. passed in Ct. at the trial. The information on which the Ct. acts is taken from the judge's report at the trial. If it did not appear at the trial it is disclosed at the sitting in Bank.

2 Bl. 397. 1 Halk. 255. 2 Lev. 160. 140.

Error is not predicable on a decision of a Ct. in granting or refusing new trials it being discretionary. *Wills. 57-2. 2 Day 364. Que. Supp.* It granted under circumstances in wh. it is not grantable. (e.g.) vs. one trial for felony?

On this point authorities differ.

(In cont. New trials can be granted only by a Civ. Ct. & Sup. Ct. - *Wills. 9.*)

These were not known in an ancient practice of a Eng. Ct. The only remedy for a false or unjust verdict being by attain. 48.

Blackstone traces them to a reign of Ed. 3^d & others to a time of Cromwell. Indeed they had not become settled & genl. till a reformation. 3. T.R. 1301. *Wills. 101. 3 B.L. 387-8.*

Salk. 648. 1 Burr. 394. 5 Bae. 240. Sta. 682. 995.

The causes in *Wills. III.* were misbehavior, in Cromwell's time, excessive damages as affording a presumption of misbehavior. But since these times they have been granted for various other causes, & have contributed to a more perfect administration of justice 1 Burr. 945.

In Eng. they have of late yrs. been granted when grantable at all as well after trials at Bar as *Wills. 9.* for a same reason - for improvement. Tho. formerly this wd. have been improper, as in such case the cause wd. have been rejudged by a same Ct. But judges sometimes give a premeditated opinion wh. they wd. be willing to retract. 1 Burr. 395. *Wills. 585. 1105.*

Bac. ab initio L. 2.

5 Bae. 243. *La. R. 1356.*

Wills. 58-7. Mod. 57. Salk. 648.

It was formerly holden that no new trial wd. be granted in those cases, viz for mis-

behaviour of a jury who tried a case.

5 Bacc. 243. 1 Sid. 38.

Halk. 564. 7, Nov. 57.

Bacc. "Trial" L. 82.

49. And a genl. maxim now is that in all cases of sufft. importance, a new trial may & ought to be granted, if it can be made to appear yt injustice has been done at a first trial. 5 Bacc. 246. 3 Bl. 588. 392. 6 T.R. 388. 638.

1 Bw. 393. 203. 209. 663. 2093 11 Mod. 202.
45 H. 238.

Genl. Rule - Motion for a new trial can't be made in Eng. after motion in arrest of judgment, for by it a verdict is admitted to be good. Halk. 544.

But a rule does not hold e. converso. There are also exceptions to a genl. rule as where a case of new trial was remitted at a time of moving in arrest. 5 Bacc. 261.
"Trials" L. 1. Buller 325-6.

It has been holden yt. when there are several defts. & all are convicted or part only convicted & others acquitted, no new trial can be granted as to one or any part of them, for a verdict it may so. must stand or fall in toto. Bacc. 223. Halk. 562. 12 Nov. 273.

Bul. 326. Stra. 814. 3 Keb. 509.

This seems to be at this time overruled in Eng. & a new trial may be granted for one or a part of them only. And a case may be a very bad one, if an innocent man is not have a new trial merely because another was joined with him. 6 T.R. 638.

In cases of this kind where a new trial is gran-

ted to several depts. when 3 record goes down
for a second trial, & one convicted in 3 first
& he only is to be tried, for 3 others hav-
ing been once acquitted can't be tried again.

Causes for granting new trials.

I. Want of due notice to Dept. of trial.

5 Bac. 241 trial L. 1. Hallk. 664. Bul. 327. But
if Dept. has appeared & defended, this cures
all defect of notice. Hallk. 528. 435. 51.

(2 Hallk. 646. Bac. trial L. 1. ut sup.)

In 3 case of want of notice & non-appear-
ance of Dept. & Ct. I presume wd. not be
left to their discretion so far as to refuse
a new trial, for there has been no trial,
& 3 Dept. has an undoubted right to be heard.

Due consent of parties can remove
all objections to jurisdiction except those
wh. relate to 3 subject-matter.

II. Defect or mistake of 3 judge before whom 3 cause was tried. e.g. Judge interested, wh. is a defect. 4. 5 Bac. 244. 11 Mod. 119. & is error in fact.

So of mistake for admitting improper evi-
or excluding yt. wh. is proper. 5 Bac. 244. trial L. 3.
6 Mod. 50. 232. 7 Mod. 53. 64. 100. 202.

So misdirection of 3 jury in point of Law
Bul. 327. 4 T. R. 753. this is one of 3 most frequent grounds for N. Trial.

In some cases new trials have been
granted in Eng. for misdirection & admission of
improper evidence by 3 whole Ct. on a trial at bar.

1 Bwv. 395. 3 Stra. 585. 1108. - No instance to it in
Comit.

The grounds for granting a new trial in Eng. see
great value probable length^{of trial} probable difficulty in
3 trial. Long. 480. 420.

No new trial on misdirection of justice has been done.
22. R. 5. The 3 improper admission or rejection of
evid. is good ground for new trial.

The incompetency of a witness, however, not
objected to at 3 time^{of trial} (tho- it be not known) is not
substantial ground for a new trial. It may^{have} its
weight among other things. 1 T. R. 7. 17. or 517. Lalk. 65
(And it is a Ct. of Eq. will grant a R. v. 194.) Peak. evid. 187, 188. 80 430

If upon any objection made to an inadmissi-
ble witness he is admitted by 3 Ct. or proper evid.
is rejected, in either case 3 suffering party
may maintain a motion for a new trial.

12 Burr. 395-5.

It is sd. yt. if 3 cause was lost by 3 testimo-
ny of a person legally infamous a new trial
will be granted in Eng. 12 Burr. 394. 5.

Settled to 3 contrary - C. L. Lalk. 653
12. Mod. 585. 1 T. R. 717. 1 B. & P. 430.

But 3 lost cases proceed upon 3 ground
to neglect. The infamy of 3 witness was known
at 3 time, but 3 record was not adduced.
But 3 cases contemplated by 3 rule must be those
in wh. 3 objection was not taken, or 3 fact of
infamy not proved at 3 trial of 3 cause.

If 3 facts were not known at 3 trial a new one
wt. probably be granted. But this for it has
been determined in Eng. yt. 3 incompetency of a
witness arising from something discovered after 3
trial is not itself a sufft. ground for granting
a new trial. 1 T. R. 717. Peak. evid. 187.

Improper rejection of witnesses is not a sufft.
ground for a new trial, if fact, he was called on
to prove, was established by other evid. or not dis-
puted. the defence proceeding on a collateral
point. 3 East 451.

With respect to character of witness pro-
duced he must take his chance. It was for-
merly held wt witness might be interroga-
ted as to fact of conviction, but now that
it must be proved by record. If record
of his conviction had been produced at the
trial, judge wd. not have admitted his testi-
mony, but as it was not done, party gui-
ty of neglect ought to suffer for it.

III. Defects or incompetency of jury or
any one of them in certain cases - e.g.

If a juror might have been challenged as
incompetent, but fact was unknown at time of
trial by party vs. whom verdict was found.

5 Bac. 264. 7 Mod. 54. 1 Kent. 30. 2 Wils. 129.

Que. in cause to challenge goes to his
impartiality. case in Kent. 26. New trial was
refused on ground of laches.^{or neglect} It does not
appear but wt. def. knew of cause of chal-
lenge at time of trial.

In stat. 29. Party must have known
of cause at the time. new trial refused.

IV. Misconduct of jury - as corrupt prac-
tices - partiality - inattention &c. e.g. if they refer
decision to chance, or cast of a die.

5 Bac. 250. 88. 91. 2 Leo. 140.

Pleas 14 & 17. 3 Bac. "trial L. 4. Bac. verdict" 74.

No for misconduct if one juror as when a foreman had declared it, & jth. shd. never have a verdict whatever evs. might be advanced.

5 Bac. 25 Trial L. 4. Plak. 845.

No if 3 jury are not unanimous. In very early times perfect unanimity was not necessary in 3 jury but for a long time past it has been. 5 Bac. 278. 3 Bl. 376.

In Eng. if they do not agree during 3 sessions they may be carted round 3 county & end of 3 term & 3 judge will not receive 3 papers till they do agree. 5 Bac. 287. "verdict" H.

But both in Eng. & Cont. if 3 jury are not entirely unanimous in their verdict, it is in strictness bad & must be set aside. 5 Bac. 291. Comb. 14. Kirb. 141. 410. 2 Lev. 250. 1 Bac. Trial L. 4. "verdict" H.

The experiment has been reported to, to evade 3 rigour of this rule & it is by permitting 3 minority to come into Ct. silent i.e. without directly objecting or assenting, & 3 assentors are not afterwards permitted to testify their dissent. Comb. 14.

Bac. Trial L. 4. "verdict" H.

In Engd. after 3 jury are locked up, it is misbehaviour in them to eat or drink without liberty from 3 Ct. till they have agreed upon a verdict & returned it to 3 judge. 5 Bac. 290. "verdict" H.

3 Bl. 395. 1 Kent. 125.

But 3 verdict is good notwithstanding their eating in it is at 3 expense if 3 gave no justice.

Pro. they are liable to be fine. Co. L. 227.

Day 218. 12 Mod. 111. 1 Leon. 152.

Le. Rd. 148.

If 3 jury eat or drink at 3 expense of one
of 3 parties before 3 verdict is agreed on & returned
to 3 judge, & they find a verdict in his favour
it is bad, & there must be a new trial. 5 Bac. 290.
(partiality vs. incommuni.) - verdict H. Co. Lit. 227. 12 Mod. 111.

For 3 purpose of relieving 3 jury from
3 hardships of confinement. & abstinence till 3
verdict is delivered into Ct. privey verdicts have
been devised in Eng. i.e. verdicts delivered to
3 judge out of Ct. 3. But a privey ~~verdict~~ ver-
dict is not binding upon a jury. They may
vary from it in a verdict given in open Ct.

Co. Lit. 227. 8. 5 Bac. 282. Vent. 83.

Plowd. 211. 3 Bl. 377. 5 Bac. 281. Mod. 33.

So yt. a privey verdict in effect amounts
to this only, yt. juries eating or drinking after
it, at 3 expense of one of 3 parties, does not vit-
iate 3 verdict, in they change it in favour of
3 party beating them. 1 Vent. 125. For in this
case there is strong presumptive evidence of fraud.

If they do they change it, it will be set aside.

Privey verdicts cant be given in 3 case of
felony, nor in any case of life or member.
Nor when 3 personal appearance of deft. is
necessy. to his conviction. 5 Bac. 283. Ray. 192.

1 Kell. 587, 597. Kent. 97. Co. L. 227.

Privey verdicts are not known in Court. - 1 Com. Rep. 481. 2.

It is so. in Vaughan 147. 3 jury have a
right to find their verdict partly from their
own personal knowledge. This does not seem
to be law. 1 Vint. 183. 3 Bl. 374. 5. Bac. 289.

It is a rule yt. no juror has a right to
communicate his knowledge to his fellows after
they have retired. If he does, verdict must
be set aside. He shd. tell it in open Ct.

1, No. 288. 9 Sliter 3 verdict is bad, for each party has a right to cross examine.

That seems also unfavorable.

The jury have no right to re-examine a witness in private after retiring. Verdict is bad & a new trial must be granted.

Co. E. 188. 311. 5 Bac. 288. 200. 74.

If 3 jury take with them any written evidence then exhibited at 3 trial with the consent of 3 parties or leave of 3 Ct. verdict is bad & is cause for new trial. 2 H. B. 318. 1 Id. 235.

The Eng. 3 jury can't take with them any written evid. then exhibited at 3 trial with consent of 3 parties or leave of 3 Ct. If they do, it is a high misdemeanor. Co. Lit. 227.

But if 3 writings furnished evid. on both sides 3 verdict is good - 9 Sliter not. 5 Bac. 288. 1 Roll. 314. 1d. R. 148. Co. E. 55. 411. 12 Mod. 250.

This distinction is a vague one. The latter rule is not so strong as that relating to parol evid. received by jury for parol evid. may vary. 12 Mod. 250.

But tho' a jurors misconduct vitiates a verdict yet they are not permitted to testify to 3 fact. The evid. if it must be derived Alinder (often continue) 5 Bac. 288. Co. E. 189. 1 Id. 11. (1 Id. 235.) 12 Mod. 441.

May not one juror testify to 3 misconduct of another? The reason why he can't testify to his own is probably not only 3 maxim that no one need criminate himself, but also 3 power it wd. give any unprincipled juror to set aside any verdict.

If a foreman delivers a wrong verdict by mistake, it may be set aside, & a new trial granted, & ^{the} jurors are admissible witnesses to prove the fact, tho' perhaps not compellable to testify to the fact. 1 Burr. 382.

The ~~judge's~~ finding a genl. verdict then directed by 3 Ct. to find a special one is not regarded as misconduct, but if in such case 3 verdict is vs. 3 opinion of 3 Ct. there may be a new trial granted.

This finding a diff't. verdict is only an auxiliary reason & is not sufft. *per se*
5 Bac. 251. 7 Mod. 37.

The latter case cited seems to impugn the rule, but yet was a motion after a trial at Bar. & a new trial was refused.

In Cont. when 3 jury have misconducted (ut supra) motions in arrest of judgment, are concurrent with new trials. *see Pleading.*

V. Finding a Genl. Verdict vs. direction.

This is not ^{per se} illegal conduct. This direction if founded genly. on one party or both, if against 3 opinion of 3 Ct. a new trial is granted.
19th Wm. 213. 7 Mod 37. Bac. Trial L. 4.

VII. Finding a verdict vs. evid. wh. is a 60.
cause for a new trial in Engd. as well as in this country. 2 Sta. 1105. 1 Com. R. 427. 3 Bac. 446. 7. Trial L. 4. 490. Corp. 37. 3 Blk. 392. Bul. 326-7.

This rule has been much objected to, as it is 3 province of 3 jury to determine 3 validity of

weight of testimony.

But it is to be observed yt. 3 Ct. try every issue of fact as well as of law & 3 jury is only 3 instrument. by wh. 3 Ct. try questions of fact, as a record is 3 instrument. by wh. it is tried.

Or as a question of marriage is tried by certificate. Infancy by inspection &c.

However 3 Ct. do not decide 3 question when they they grant a new trial. They merely take it from one jury & give it to another, & such power is absolutely indispensable in 3 Ct. for in cases in wh. 3 verdict is vs. 3 weight of evidence & this manifestly - a new trial will be granted.

The Ct. must presume either corruption, or obstinacy, or ignorance, neither of wh. shd. be 3 gates of justice.

A new trial is not granted in this case if 3 scales of justice nearly balance.

3 Com. 392.

But it has been so yt. in this case there must be no evid. in support of 3 verdict, or so little yt. it amounts to nothing at all.

Wia. 1106. 1142. Bul. 327. 3 Bur. 323. Prac. Trial. L. 4. 3 Blk. 392.

This, however, seems not to be a rule & it is now held yt. 3 Ct. ought to grant a new trial, if in 3 opinion of 3 judge 3 weight of evid. is clearly vs. 3 verdict.

This matter must be handled delicately as 3 evid. is 3 jury's province. Bul. 327.

3 Bac. 247. F. 4. 3 Bur. 322.

61. VII. If 3 jury have given a verdict on a mis-
conception of a point of law or fact, vs. law, a

new trial is granted. 12tra. 425. 12alk. 656. 12omb. 362.
2 B.R. 1078. 2 Wils. 307-8. 4 T.R. 470. 12d.R. 147. 12Gosms.R. 279.

There are not many cases of this
kind 1 John. 279, 12tra. 525.

12to new trial has been granted for
this cause, when 3 case was a hard one, or when
justice had been done. 2 T.R. 5. 5 T.R. 525.

12s on point of law 12lth. was entitled to nomi-
inal damages only & 3 verdict is for 3 deft.
new trial is not granted for 3 cause is too
small & justice has been done.

12ac. trial L. 4 12Burr. 2033. 1 T.R. 758.

These cases may occur either when the
facts are agreed upon or when 3 evid. is
perfectly clear, & 3 jury make a wrong con- 62.
clusion from them.

But if 3 judge makes a mistake
as to law, & 3 Ct. feel themselves more under
an obligation to grant a new trial, than
when it is done by 3 jury. 2 T.R. 5. 5 T.R. 42.

VIII. Smallness of damages is a cause
for a new trial. But this ground it seems
is only good in an action on a contract; as
a promissory note &c. for a sum liquidated
as on a bond or note witht. indorsemt. & no evid.
of payt. & 3 jury find but half 3 amt. it
is 3 duty of 3 Ct. to grant a new trial. ~~about~~
12Burr. 552. 2 12tra. 920, 946. 5 12Bac. 258. Trial L. 4.

12Boul. 327. 2 12Burr. 366. 4 T.R. 655.

There is no case of test in wh. this ground
has prevailed, & 3 genl. rule is vs. it, the
Barron & Barnes thinks it shd. apply. 2 vol. 585.

The rule, however restricting new Trials for smallness of Damages, to contracts, or some liquidated sum, does not hold when a jury have made a damages small thro' a point of law; as by supposing one of 3 plffs grounds of recovery wrong, when it was not, & when 3 plffs have been deprived of their just damages by an unfairness; as by deceiving a jury in computation &c. *Stea. 425. 1259. 2 Salk. 677.*

In these cases, however, it is not a smallness of damages per se yt. is a occasion of a new trial, but a fraud or mistake producing it. *Stea. 425. 1259. Salk. 677.*

IX. Excessive damages is a good cause for a new trial in cases of contracts & torts.

Especially so as to torts.

1 P. 2. 27. Burr. 547. 2 Wils. 244. 405. 5 D. 51.

Stea. 425. 1259. 1 D. 55. 1 D. 52. 1 D. 50.

3 D. 50. 1 D. 50. 1 D. 50. 1 D. 50. 1 D. 50.

It has been sometimes contended that a new trial will not be granted unless the excessiveness of damages will raise a presumption of partiality in the jury, but there is no need of raising such a presumption - if the damages at first appear excessive, a new trial will be granted. *2 Wils. 202. 1 East 557. What. on Torts. 215. 1 D. 50. 88. 1 D. 50. 23. 2 D. 50. 113. 125.*

In some actions grounded on tort a new trial will not be granted according to some authorities. *1 P. 2. 27. 5 D. 50. 257. 1 D. 50.*

4 J.R. 651. 674-6. Bacon's 900pt. "Trial" L. 4.

It is genly. agreed that a new trial may
be had for excessive damages on a verdict.
2 Salk. 344. State v. L. 100. 21. 2 Wils. 27.
1 Burr. 374. Bac. abr. "Trial" L. 4.

It is never granted for crime con.
3 Mills. 2, 204. 5. 167.

The true rule is that if a new trial for ex-
cessive damages is granted in any case what-
ever in wh. the damages are presumptive, it
may be in every other case similar.

2 Salk. 629. 7. R. 277. Com. D. "Tri." E. 2 J.R. 557.
5 J.R. 257. 2 Bl.R. 929. 1527. 2 J.R. 166.

X. That counsel have made a mistake 66.
in pleading has been made an ingredient
of a cause for a new trial in Eng^d.

3 Burr. 1387. 2 J.R. 151. ¹⁷¹² East 637.

10 Mod. 202. 3. Bac. abr. "Trial" L. 5.

18 M. 88. Comp. 571. 2 Wils. 262. Chit. Bl. 213.

In this State (cont.) it is by Stat. made a
distinct, substantial ground of a new trial.

In this State (cont.) it is by Stat. made a dis-
tinct substantial ground of a new trial, et. ante.

But a neglect in counsel is not a good cause
for a new trial. 6 Mod. 22. 222. 2 Salk. 635.

Bac. abr. "Trial" L. 5. 3 Morgan's Essays 18. 112. 3. 84.

The usual mode of obtaining a new trial in 67.
this State is by petition. 1 Root 573.

It now lies on never in granted when the
witness might have been obtained by rea-
sonable or due diligence. 12 Mod. 584. 2 Stra. 694.
1 Will. 98. 2 Mod. 22. 1 Mac. ab. "Trial" L. O.
See. in Chy. 174.

That a material witness made a mis-
take is no ground for a new trial neither is
the negligence. See. re. 11 Mon. 154.

XII. The discovery of new & material 70.
evidence after trial is by stat. a good
ground for a new trial. It has been said
so to be in Eng. 12 Mod. 584. ; Mac. re.

The later Eng. opinions are vs. this rule re-
solvedly. 1 T.R. 205. 1 Mac. Chy. 174. 1 Will. 98.
1 T.R. 84. 2 T.R. 113. 713. 1 T.R. & Pul. 428. - 50.
1 Mon. 15. 93. Mac. ab. "Trial" L. O.

It is good ground re. in Court. by Stat.
But the Ct. must be satisfied that the evi.
is both material & discovered since the trial.
Hab. 2823.

XIII. The misconduct of the parties is an-
other ground for a new trial. 11 Mod. 141.
1 Mac. ab. "Trial" L. O.

If it is discovered that a party for whom
the verdict is found has conversed with one of
the jurors respecting his case, it is a ground for
a new trial even if the evi. is decisively in
his favour. 2 Roll. 16. Mac. ab. "Verdict" 1.

78. It is an ancient rule that the jury is the ally
of the party successful in a good ground in
a new trial. 11 Mod. 119. 1 Kent. 125. Bac. 41.

It is not material whether such attempts
have had any effect on the jury or not, the
mere fact that such dangerous attempts
have been made is enough. Mass. 41. 20.
2 Kent. 125.

It may be laid down as a general rule,
that where kind of embracery practised
by a party successful on his attorney
is a good ground for a new trial.
11 Mod. 119. 1 Kent. 125. Bac. 41.

A embracery is meant any attempt to
influence the jury improperly.
1 Mass. 229. 13 Bk. 140. 1 Kent. 125.

It was formerly held in Eng. that no new
trial sh. be had in an action of "ejectment".
Balk. 848. 850. Bac. 41. 20. 1100.
For the parties are fictitious.

The Rule now is, that where the verdict is
in favour of the plaintiff a new trial may
be had in this as well as any other action.
Hous. 40. 41. 1224.
Barnard. 320. Bac. 41.

Whether a new trial may be granted whether
for plaintiff or Defendant.
For here the parties are not fictitious.

It was formerly held that after two similar verdicts it was not in the power of the judge to grant a new trial. 1 Lev. 27. 1 Sid. 131. Chalk. 649. 6 Mod. 22.

This rule is now exploded.

4 Burr 218. 3 Wils. 387.

A new trial can't in genl. be granted upon any exception to the verdict which was not taken at the trial. is it might have been taken & was not. 10 Mod. 222. 3.

In criminal cases new trials in genl. were not granted w. the Capt. the rule in his favour. 1 Wils. 387. 1 Mod. 128. 1 Sid. 899. 12 55. 3 Wils. 17. 3 Wils. 39. 1 Lev. 27.

70.

This is more a matter of indulgence than not strictly, according to the principles.

By the C. L. the Genl. Rule is, that on a second higher than a second count a new trial can be granted on either side. 6 S. R. 638.

For in prosecutions on felony or a capital offence there cannot be a new trial. For no man can be twice put in jeopardy of life for the same cause.

How far a Ct. may discharge a jury in a capital case before the issue is committed to them, or when they cannot agree, there has been direct contrariety in opinion.

2 Hawk. cap. 22. § 1. Fort. Cr. L. Pinlock's case - 1801. 10. 84. 5 Co. 45. 103. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

If a party accused of a crime by reason
ing a grand jury the Ct. has retained an
acquittal a new trial will be granted
to him. 10 Am. 238. Pa. 10. 520. See also.
Trial L. 8. 12 Mod. 9. (Ld. Ray. 63. - see also L. 10.
127. (Root 93.)

La. J. Mansfield says that there is
no thing so common that grand will not
vacate it.

Actions on Penal Statutes.

According to recent determinations new tri-
als are granted on both sides in actions on
Penal Stat. The action is a civil suit.
4 D. R. 753. 5 D. R. 20. 3 East 451. 4 D. R. 758.
3 Mag. 108. 1 Will. 17. 3 Will. 54. Sta. 899. 1438.

When a new trial is granted after verdict,
the granting of the trial vacates the verdict.
But then as in this & several other States a
new trial is granted after judgment it va-
cates the judgment.

In England where a new trial granted the
party who succeeds in the 2^d succeeds in the 1st
in recovering the costs of both.

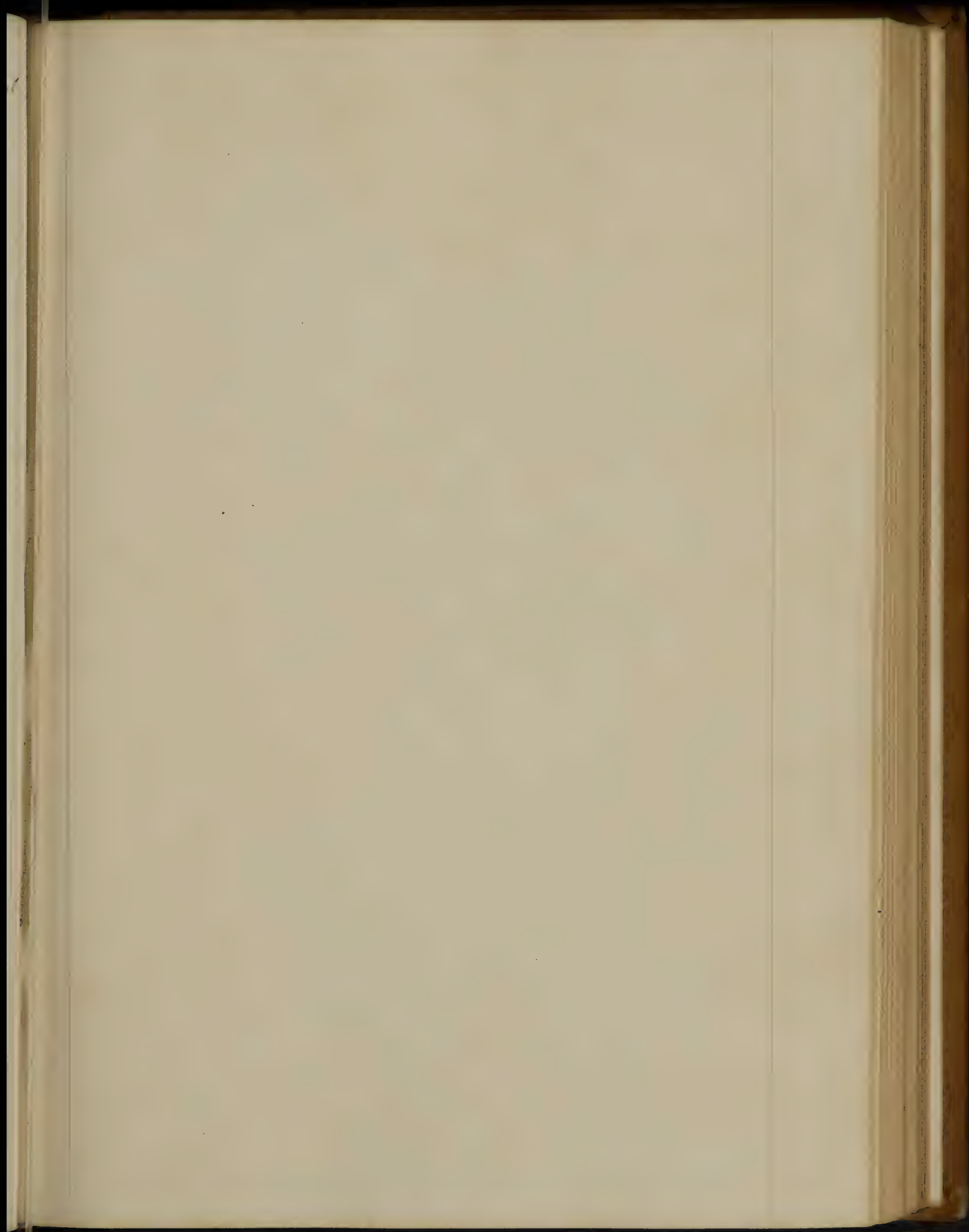
But if the party who lost the first suit succeeds
in the 2^d he is entitled to the costs of the 2^d
suit only. 8 D. R. 619. 3 S. R. 507. 1 H. Bl. 639, 641.

In this #. entry the whole ends & follows the final
event. (Main count.)

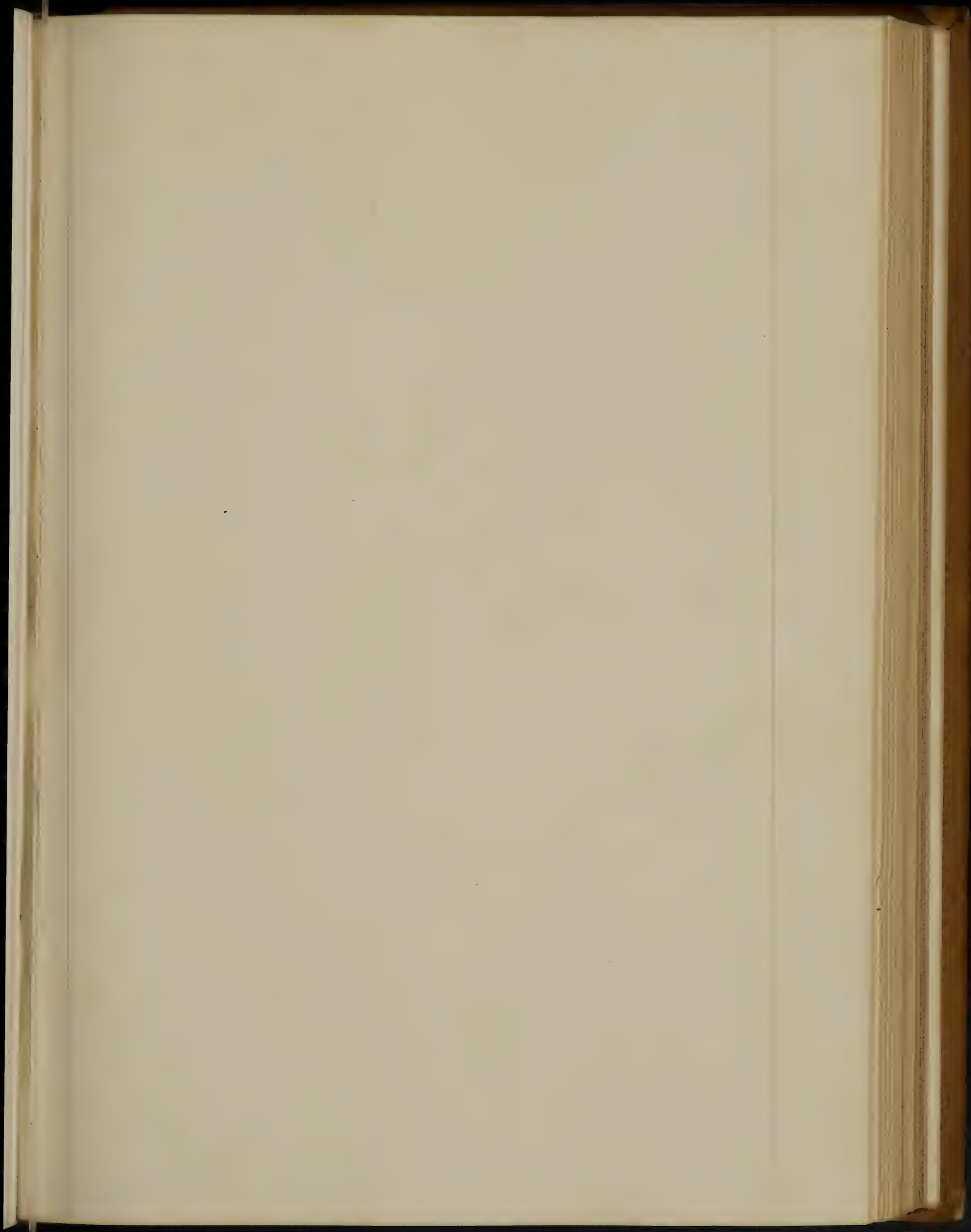
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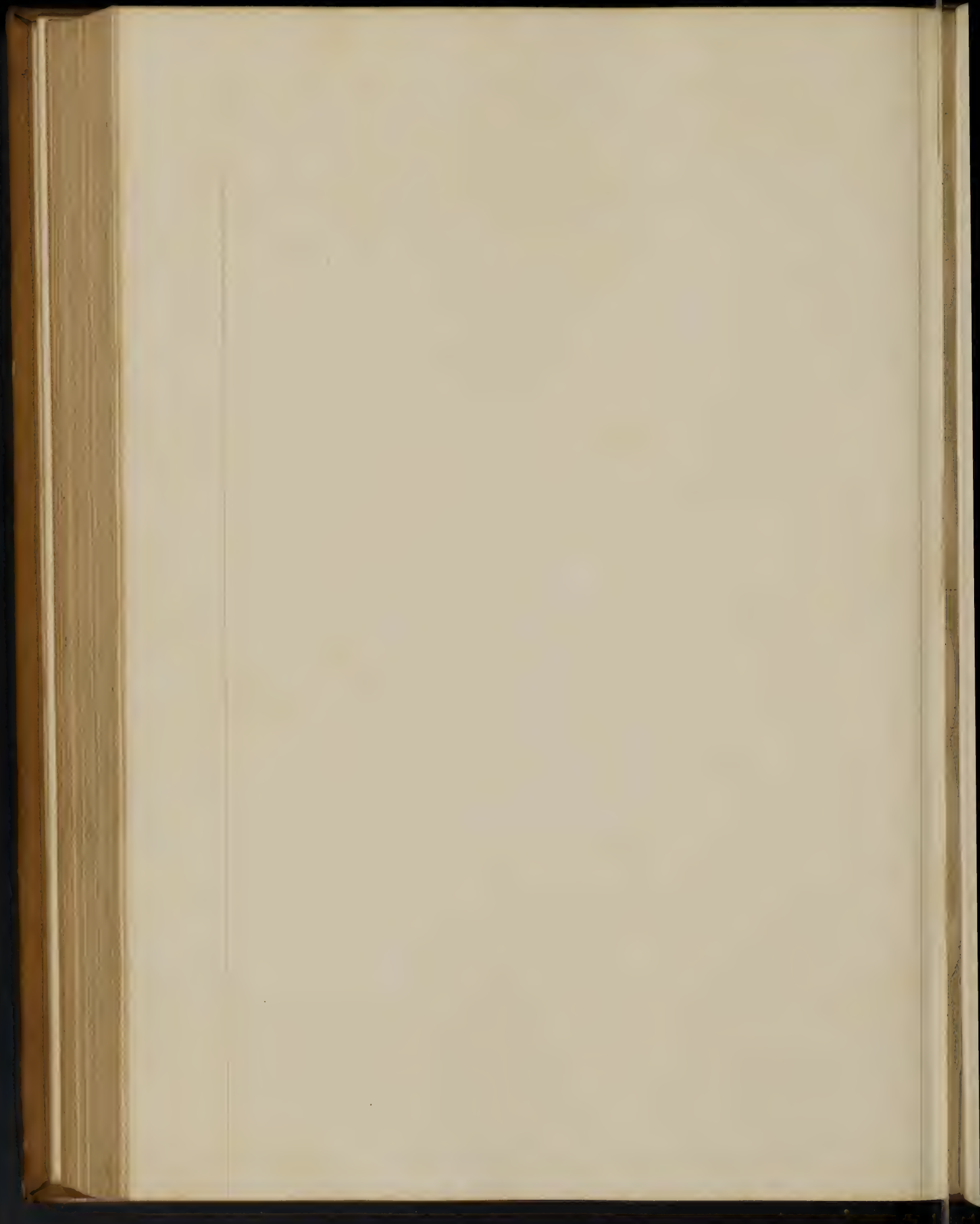
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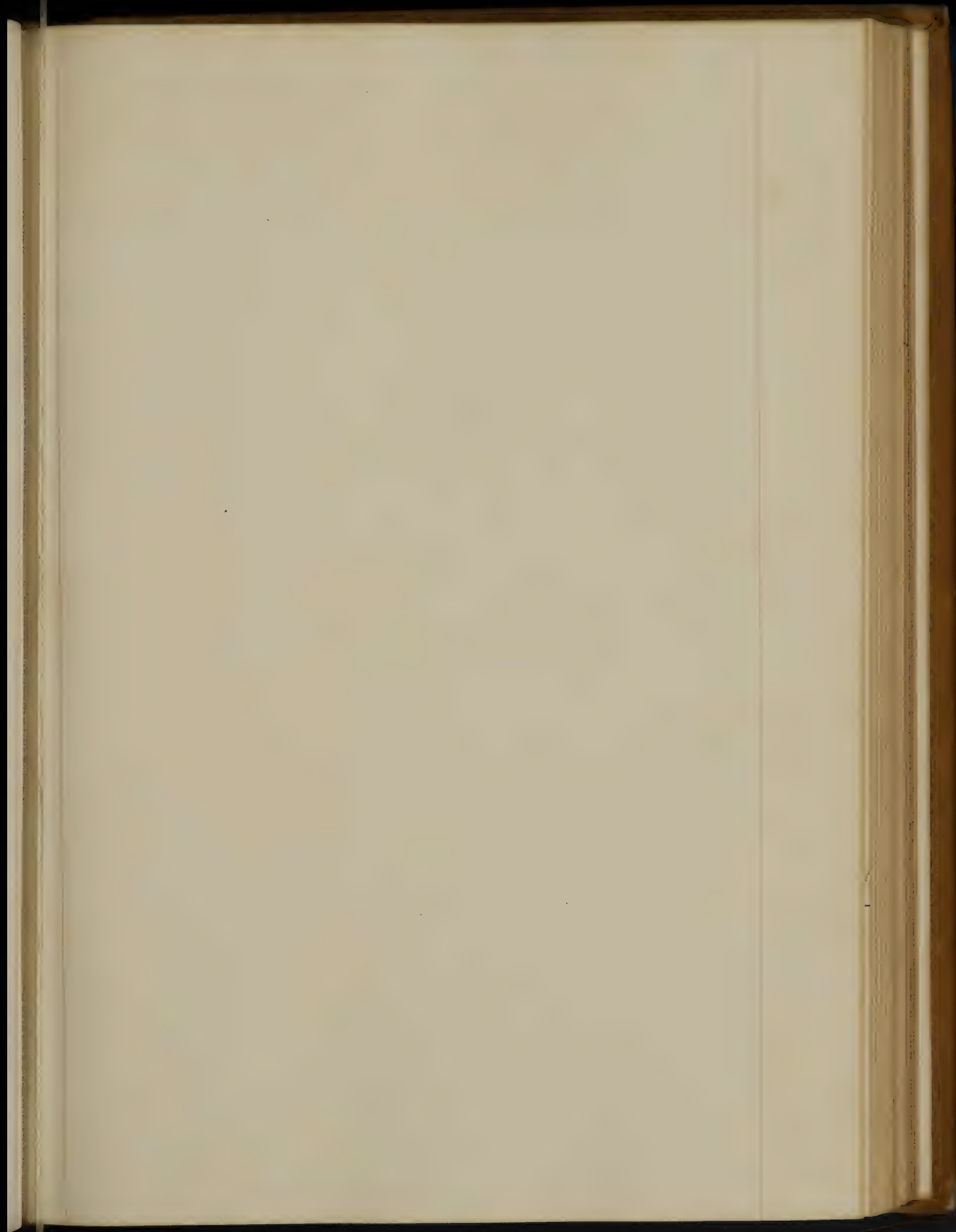
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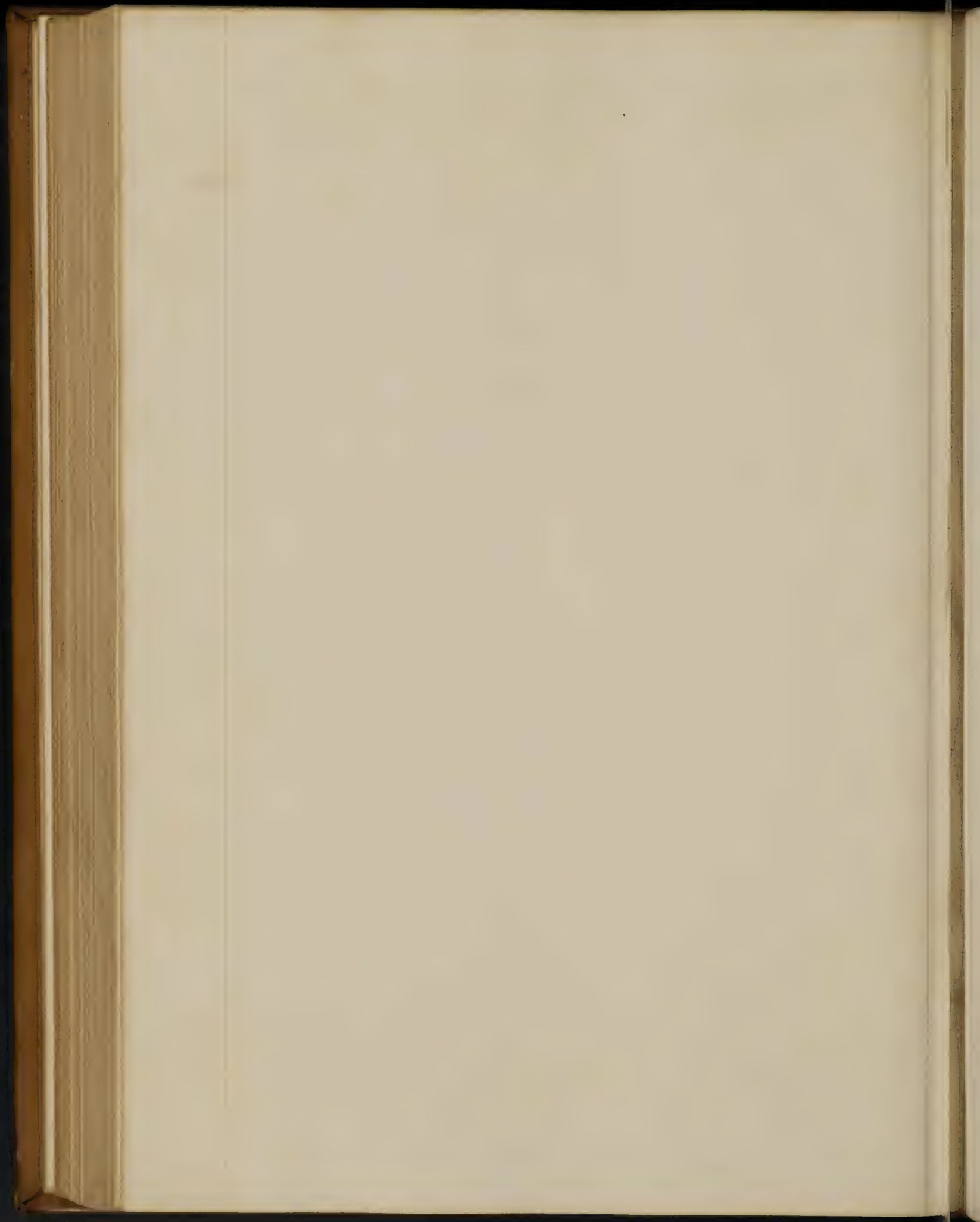


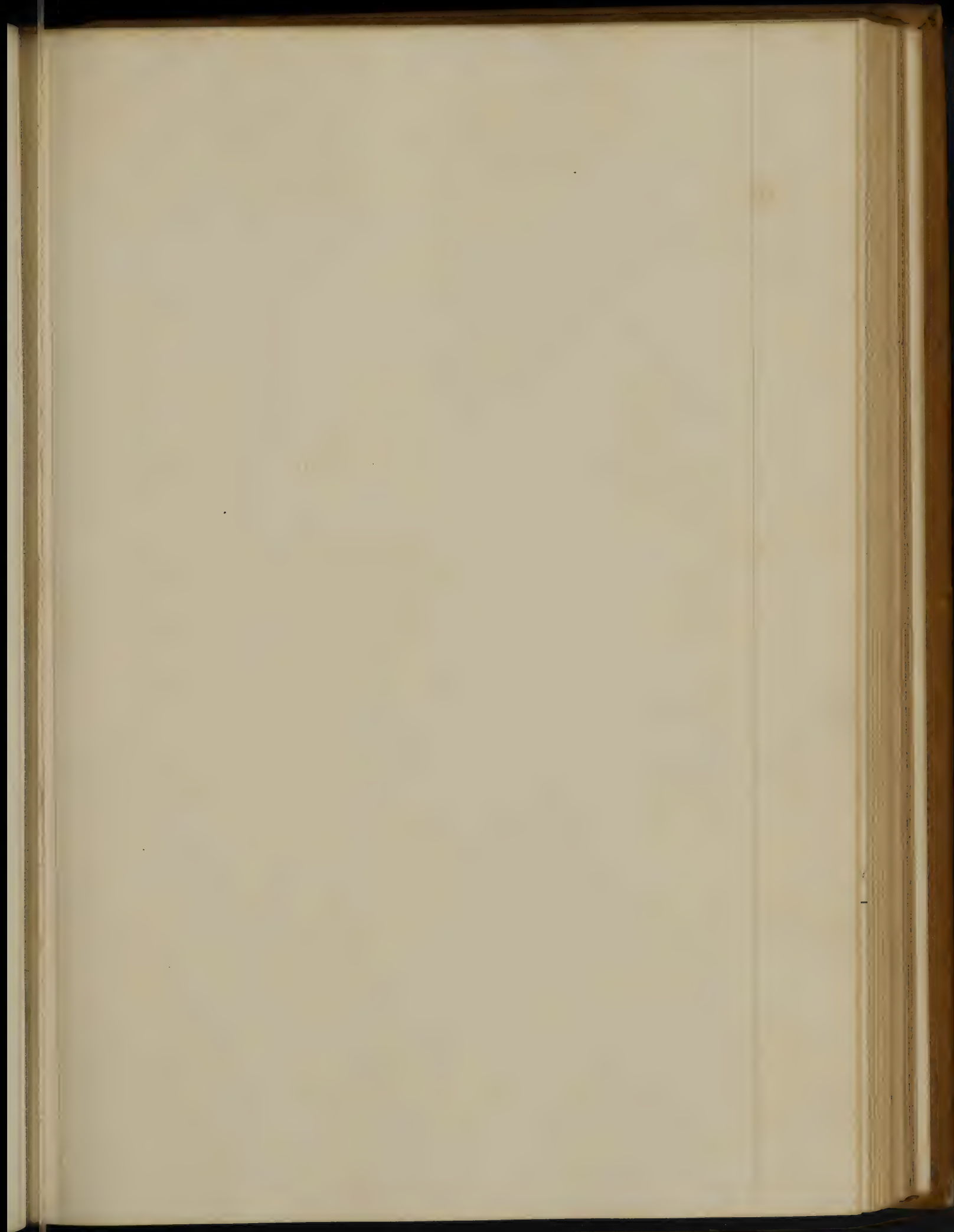


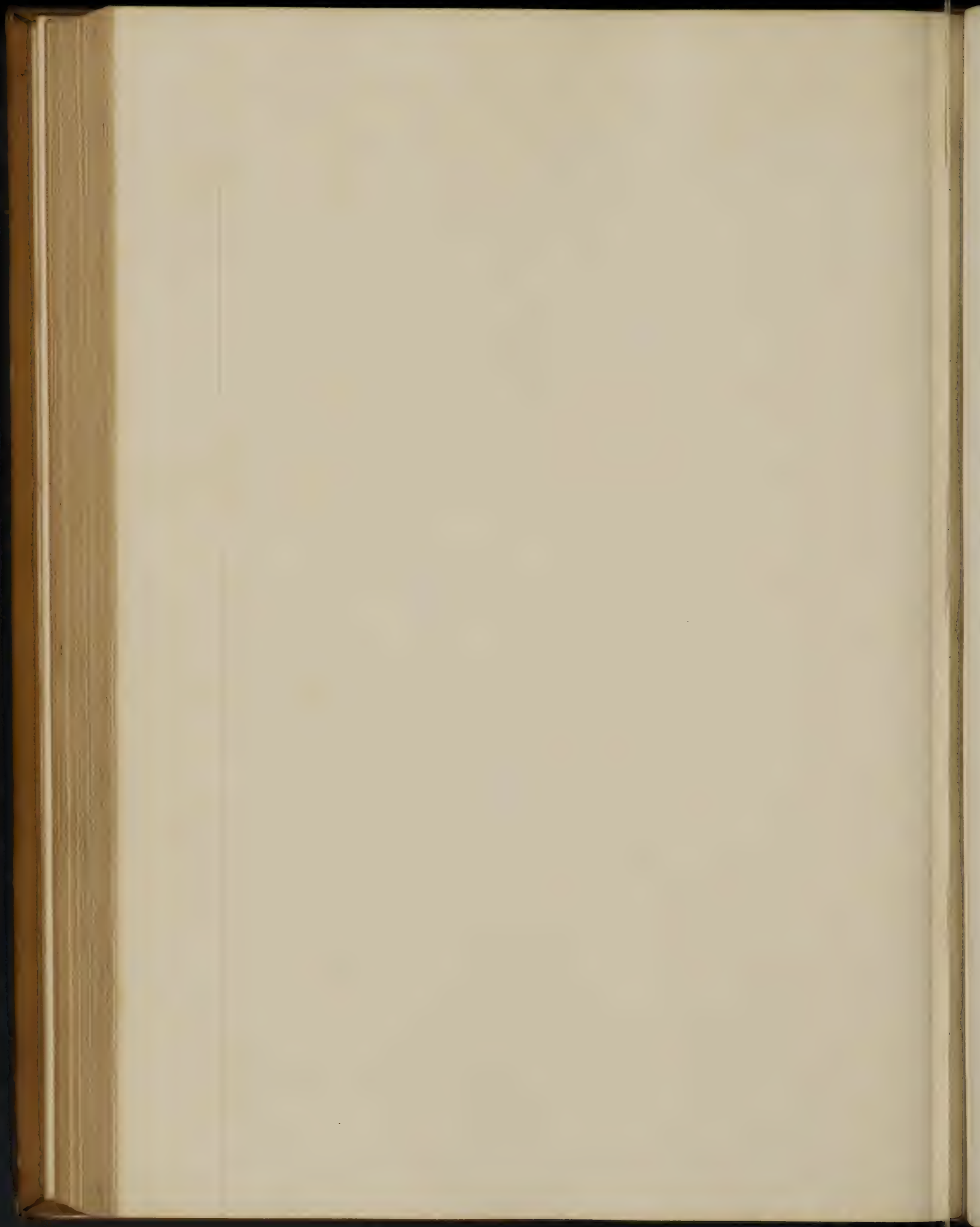


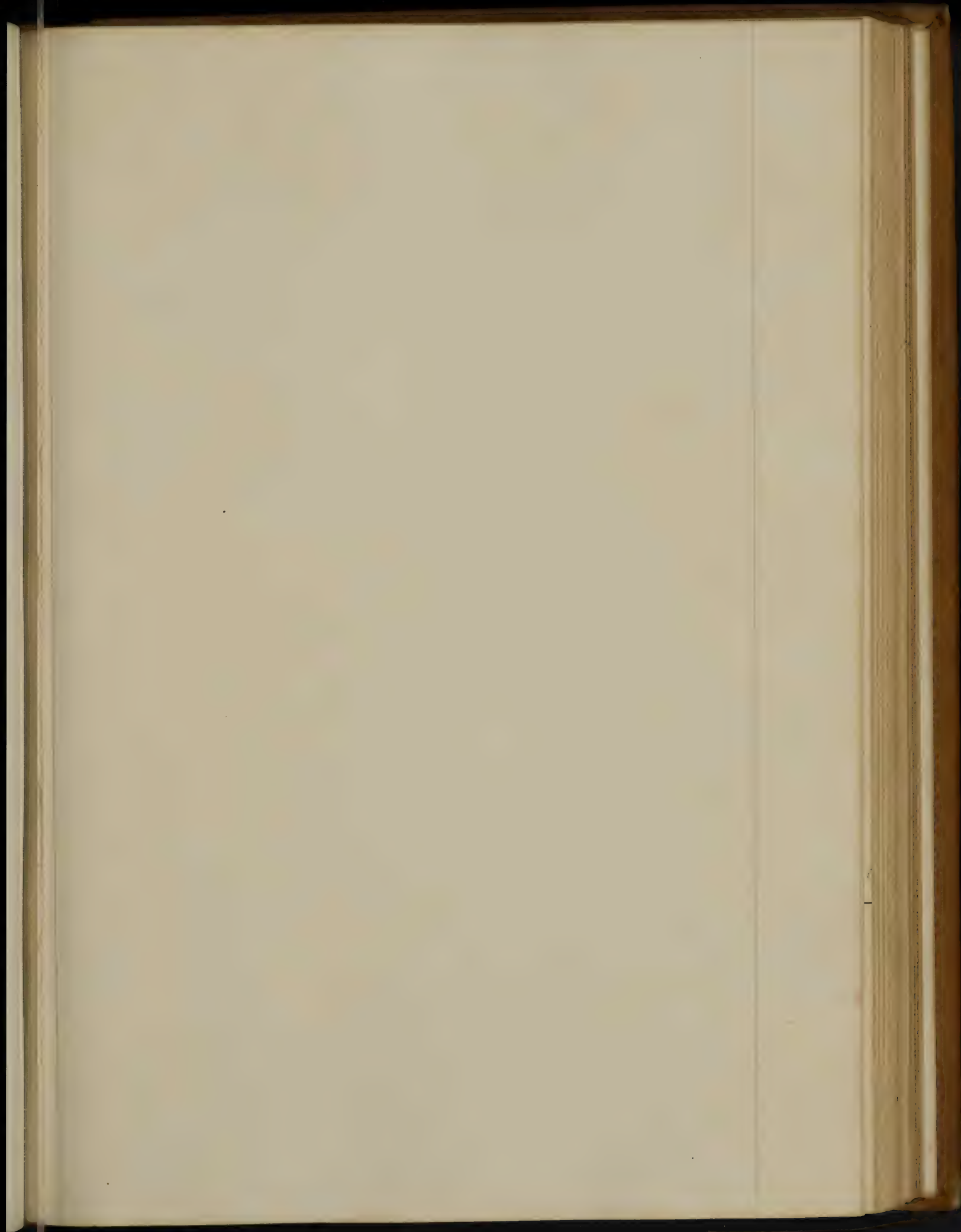


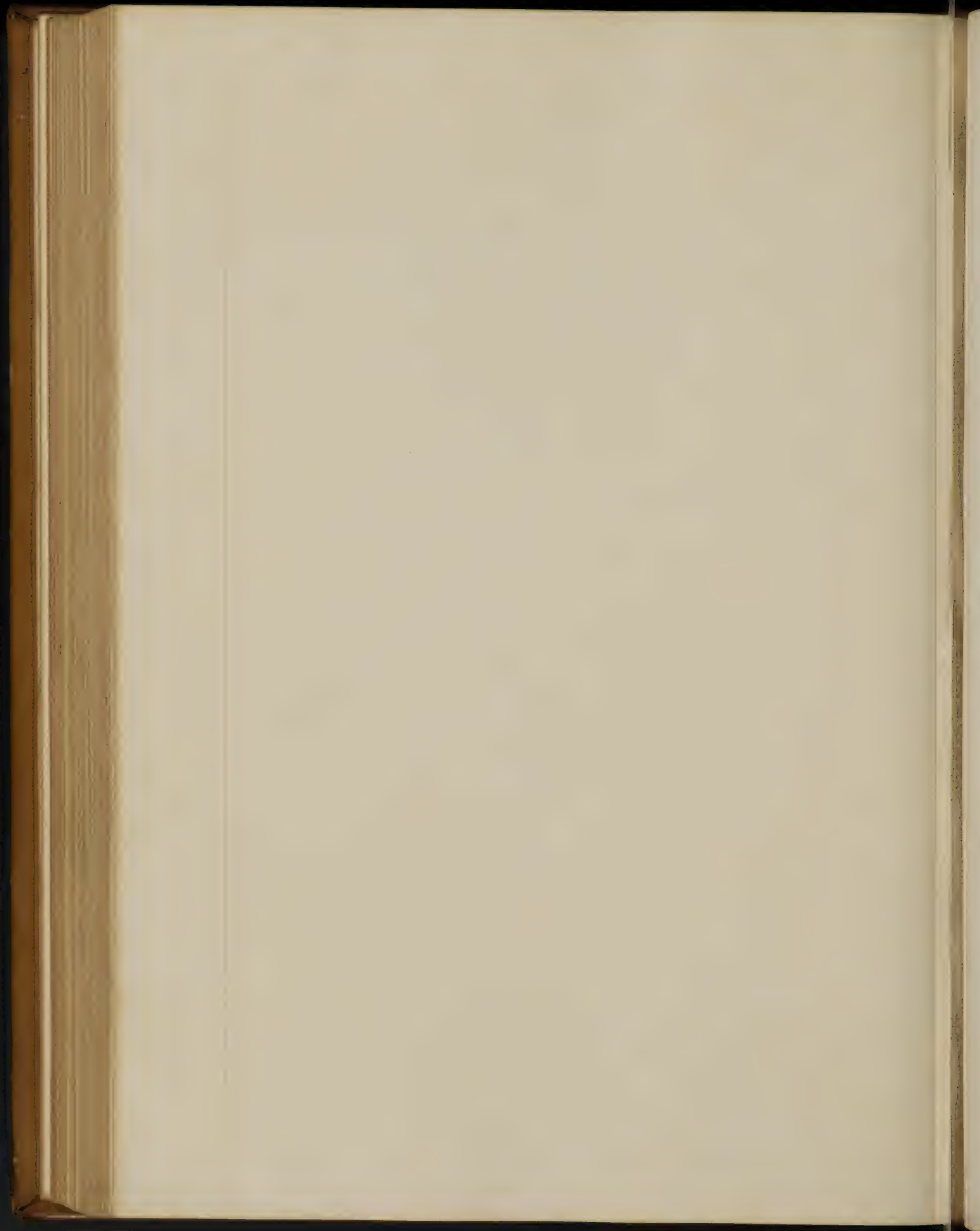


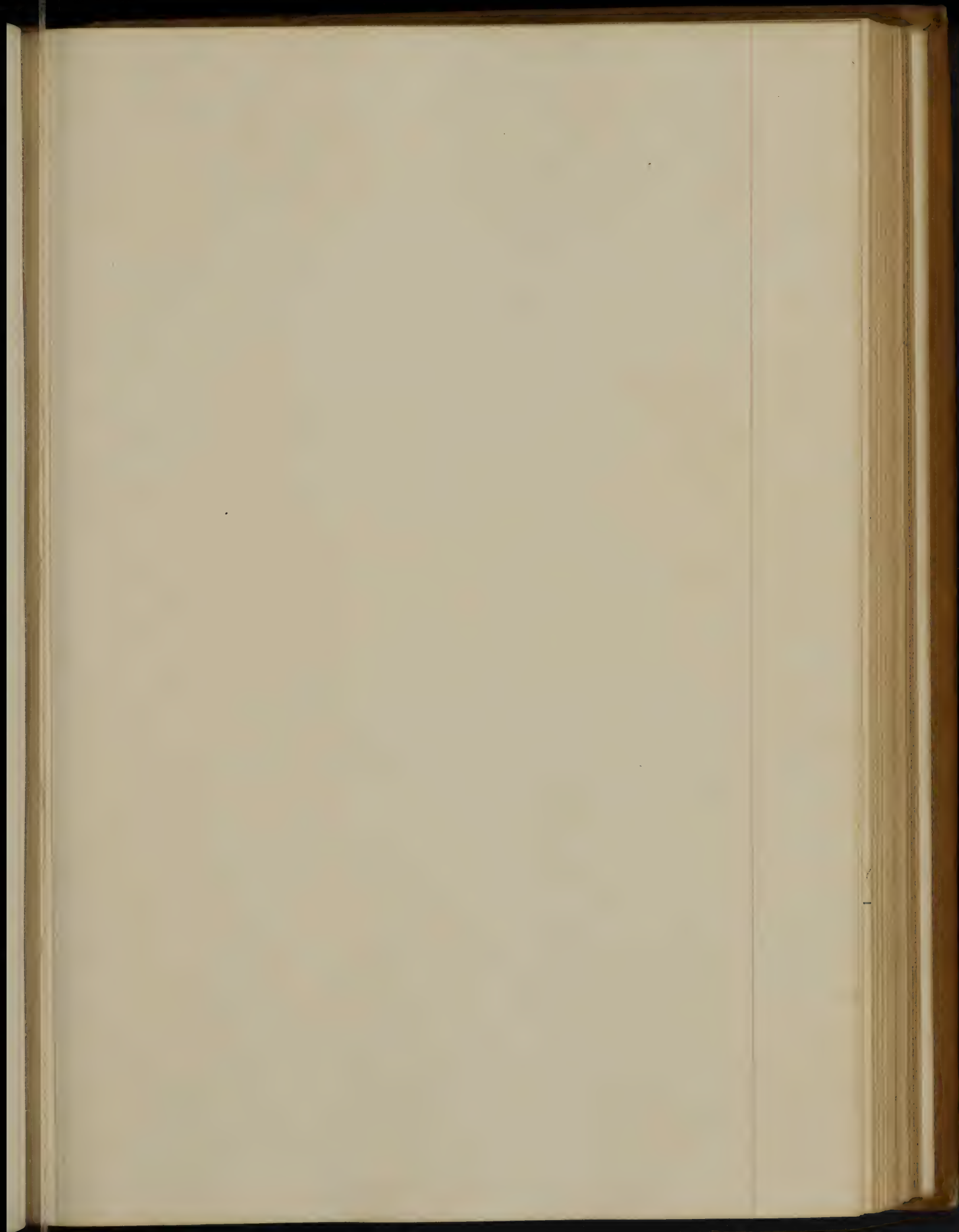


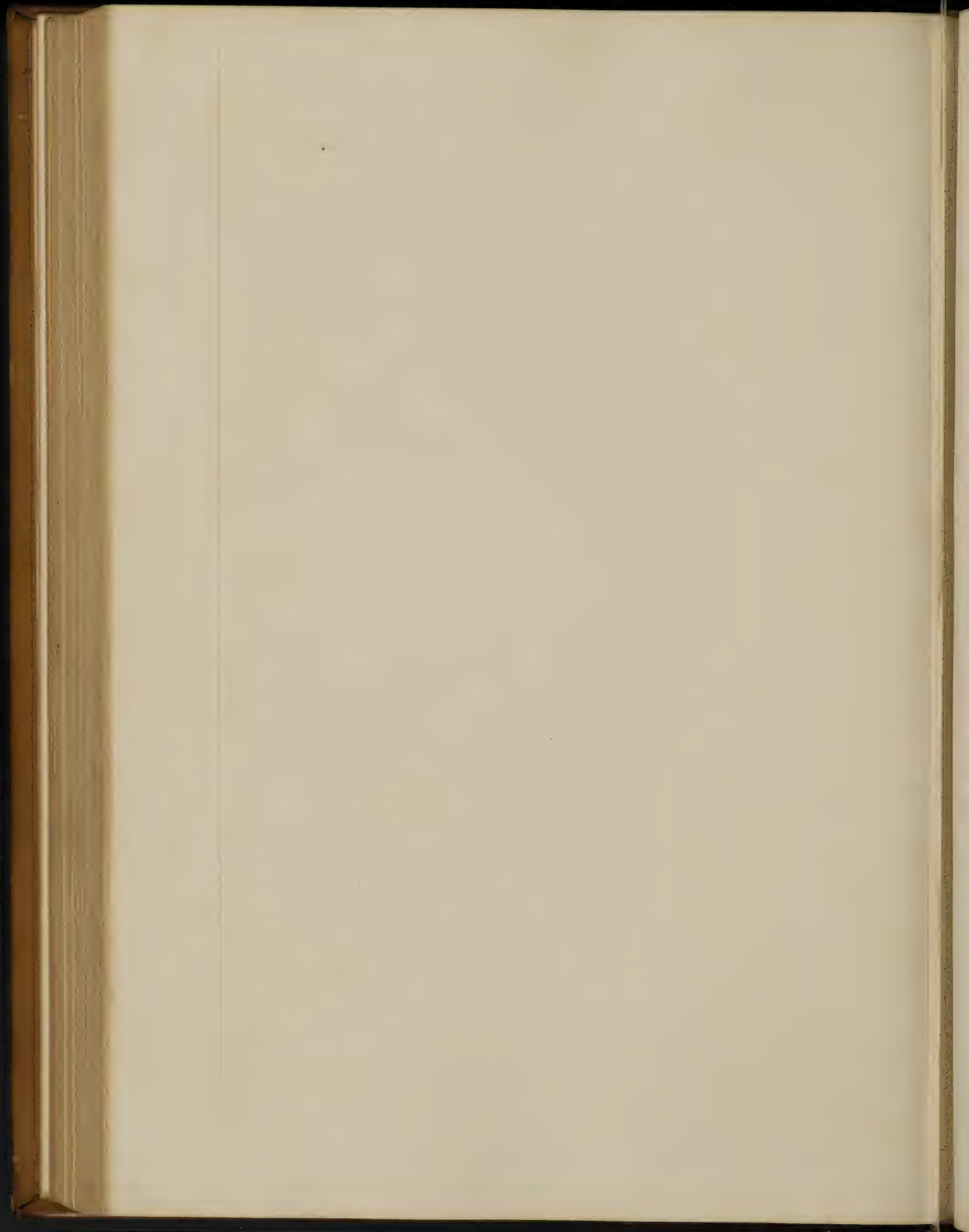


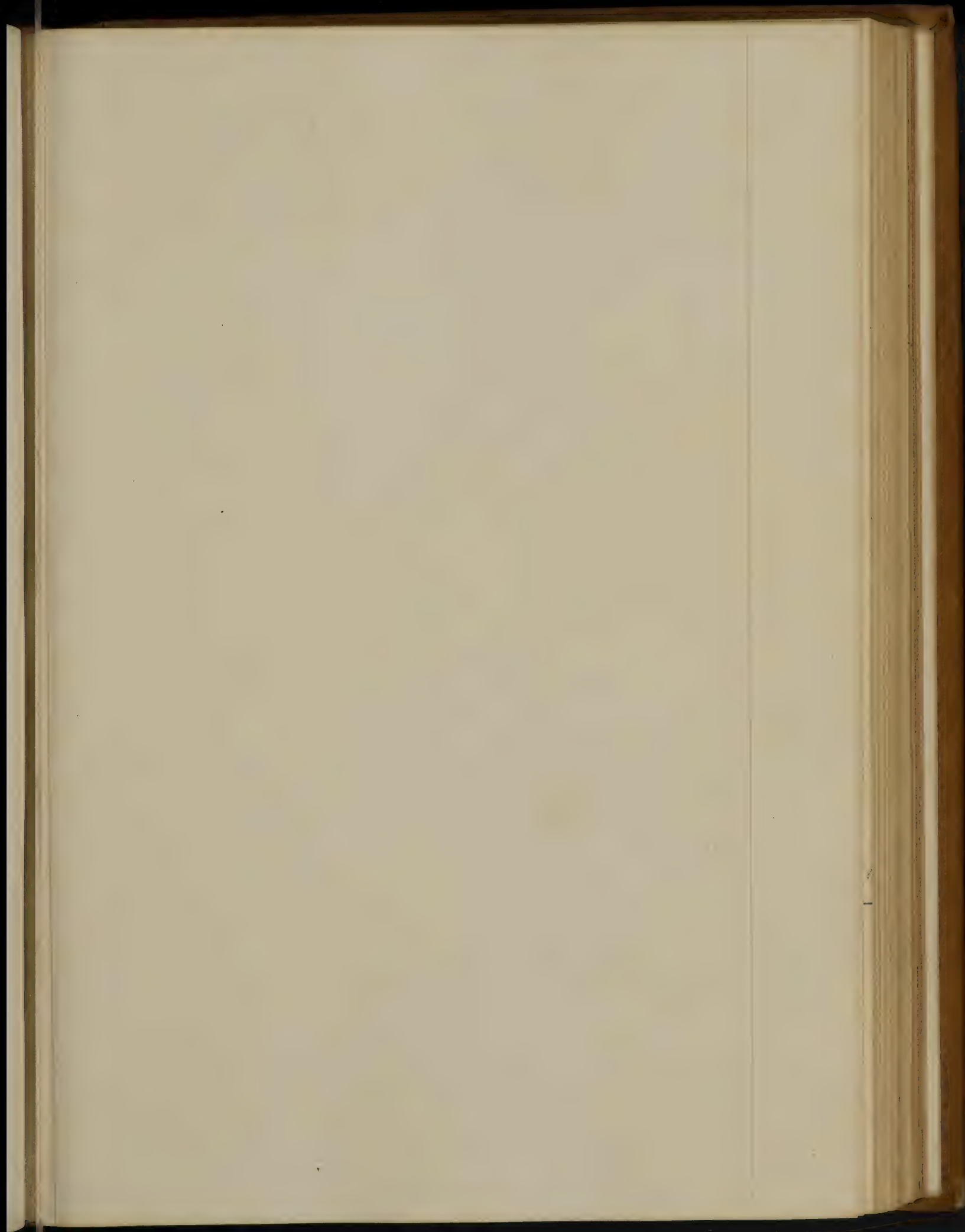


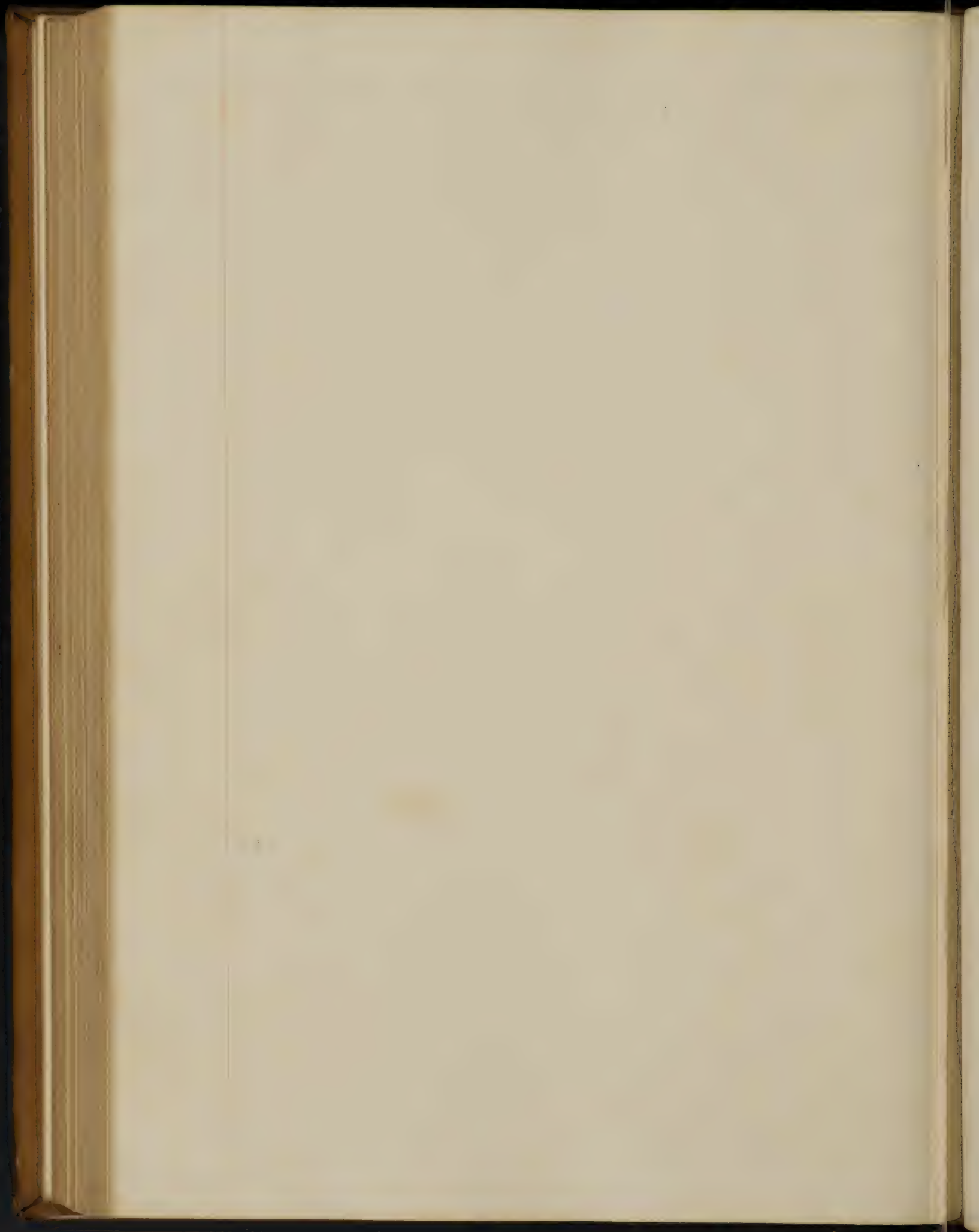


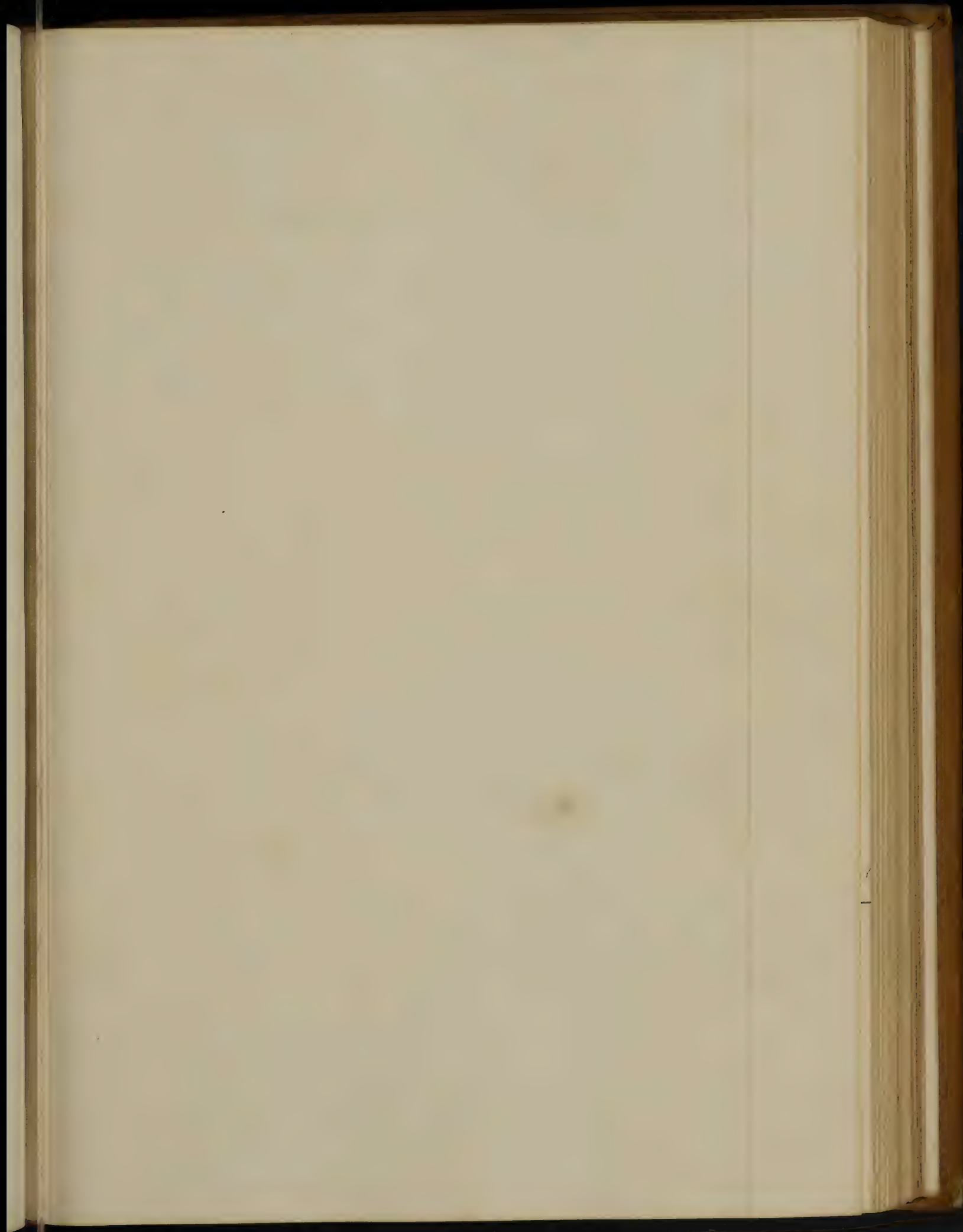


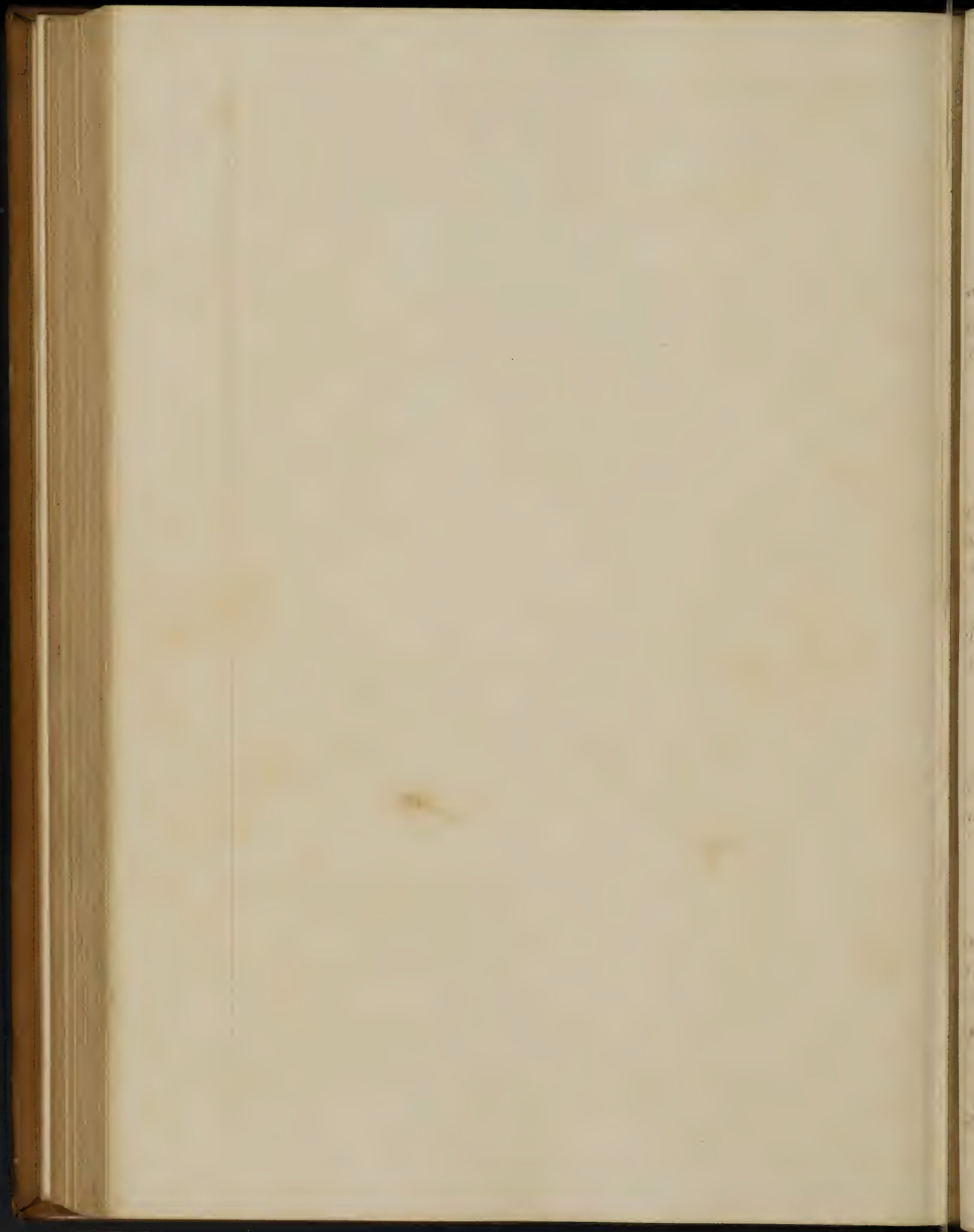












Evidence. April 6th

The credibility & weight of evidence are generally to be determined by a jury; its admissibility being matter of law must be settled by the ct. 12. 14. 201. 205. Doug. 300. 301. 302. 2. 3.

When however a record is put in evidence in the case "not that record" the weight & effect of it are to be determined by the judge, or ct.

You may see the issue is closed to the ct. as to the evidence. 12. 14. 201. 205. Doug. 300. 301. 302. 2. 3. 40. 48. 220.

For a record is of too high a nature to be taken by a jury or in any other way than in itself. 12. 14. 201. 205. Doug. 300. 301. 302.

But when a record is introduced incidentally on an issue to a jury, it is to be read as evidence to them. Not in effect it may be a conclusion of the facts which it imports to find or establish. 12. 14. 201. 205. Doug. 300. 301. 302.

Ex. of judgt. & execution exhibits the evidence of title in testament.

whether party is bound to prove those facts
which are not denied, or such part of the
facts as are not denied on one side are of
course admitted to be true. 22a. 7. 5. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

There is an admission on one side in the latter 2.
an admission on the other side including the
former from denying the fact so ad-
mitted. 22a. 7. 5. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

One
Partly.

The burden of proof lies regularly upon the
person who takes the affirmative of the issue.
For in genl. a negative does not in the nature
of the thing admit of direct proof. 22a. 7. 5. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

But there is an exception to this rule when one
is induced to go not doing an act wh. by L.
he is required to do, for in such cases the
presumption would be to presume
guilt. And this exception holds as well
in civil as in criminal cases. 22a. 7. 5. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Ex. Indictment for not repairing
a bridge or highway & this exception holds
in all cases where the alleged omission involves
a crime or offence.

But, does it hold where the alleged omission is the
amount to criminal neglect? 3 East 192. 200. 1.

When an issue is taken on the life or death
of a person once existing the burden of proof
lies on the person asserting the death. 22
3/3. 2 Phil. 12. 2 East 512. 2 Roll R. 61.

For the legal presumption that the person
once living continues so, till by direct
or presumptive evid. the contrary appears.

And the rule wd. be the same if first two the
party shd. plead the fact in the negative, or
be alleging that C. D. was not living.
2 Phil. 12. 2 Roll R. 61. 2 Langb. 113.
6 East 80. 85.

By Stat. in Count. it is allowed to presume
that a party is dead (in some certain cases) after
an absence of 7 yrs. - it must be alleged in the
plea. 10. 11. 12.

If a legal marriage being proved, coe-
sistency of issue. born during wedlock is pre-
sumed. Phil. 12. 13. 14. see "Parent & Child."

No other evid. can be received than such judicial
as is pertinent to the Issue or matter of fact in
dispute. Other evid. than this is called irre-
levant. 2 East 7. Rex v. 2 H. Blk. 205.

Since the character of either party in civil ac-
tions cannot be called in question, unless it be
set in issue in the proceedings itself i.e. in
it conduces to some or disprove some matter
of fact involved in the issue. 1 Phil. 6. 15. 2 Phil. 187.
22. 3.

adultery with himself, for such misconduct
may have been occasioned by his marriage.

Plat. 4. 2 Eds. Pa. 1822. 2d. 40. 1. Leds. 31.
Phil. 1829.

In an action for breach of promise of marriage also, the Def. is allowed in mitigation of damages to impute the genl. character of the plff. in chastity & to prove instances of her licentious conduct. 1 Ed. 2. 2.

201. - cas. 116? 3 9/16 1/4. 22. 89. 3 1/2 1/4. cas. 250?

For the fiction suits her character & conduct
in issue as in the case of Walter.

note. that he not in fact, the
most character in every & any respect:
(in the w. position. Int. M. if robot.)

But it has been holden that where the
Deft. was seduced & betrayed that such an in-
ferior character cannot be admitted in this
action, in reference to the time between mak-
ing the promise & the receipt of it. July 1. 1841.
as the seduction itself may have recaptured
her ~~lost~~ character.

This seems to be a correct distinction. But
Macleod & John. cat. 116? contra -

2nd. How is actual prostitution as a diff. dis-
covered in the act, after the promise is a
bar to the action?

to also in actions by a parent or master
for seducing his female servant. "per quod
seduction servitium amittit" in Def. may in mitigation
of Dam. impeach the publ. character of
the daughter &c. for chastity, or even her
conduct to have been notorious. (Note 474)
In this case, if service is nominally the
gist of the action, it is not when the par-
ent sues. the rule or principle ground of
damages, when a parent is plaintiff it is the
violation done to his feelings & affection, &
the disgrace occasioned to his family. (Note 475)
3 Will. 4. 9. 3 B. & D. 878. Lawes 878. 11 East 235.
10 Mod. 1087. 2 Leach 52. "Parent & Child" 111.

Note. Can we show that her character
was bad after seduction?

Plunder.

In actions for slander it is the constant
practice in Court. to permit the Def. by
way of mitigation of Dam. to impeach
publ. character of the Plff. as to the spe-
cies of crime or other matter charged by
and said i.e. to show his own reputation
not in this respect. (Note 354, 750.)

In Eng. there is no such
publ. rule Phil. 140. 6 Mass. R. 318. 1 Johns. 46.

But in later the Court
rule is adopted in Eng. & Canada 251. 200. and
1000. 92. 11 Howell & Selwin 287.

In standard the plaintiff may give evidence of his rank & condition in life to aggravate damages. Deft. may also do the same to mitigate them. 10 Mass. R. 551.

In actions of malicious prosecution the Deft. may show plaintiff's genl. character to be bad, the way of showing probable cause. 10 Phil. 158. 2 S. 502; 20.

Should
proven.

(Exp. R. & Exp. cas. are something)

In criminal cases also when the Deft's character is put in issue by the prosecution, the prosecutor may attack his character by proof of particular facts, otherwise it wd. be impossible to prove the charge. See Post of Peak. 2. Bul. 296. 11 Mass. 124.

Crim.
Cases.

But in criminal prosecution facts the Deft's character is in issue only when it charges a habit or course of criminal conduct, as contradistinguished from individual specific acts.

Ex. In Indictment for receiving a stolen house, — for being a common scold.

6. But there is one case of this sort in which the prosecutor is not allowed to examine as to particular facts without giving previous notice & then viz. where one is indicted for being a com. barterer.

This rule is founded on the presumed difficulty of defending vs. such charges.

such notice. The prosecution being guilty,
as these were suggested it is to carry on
suits as well follows. Bul. 290. Pra. 7.
as

But in criminal cases, in wh. character is
not put in issue, as in a prosecution for
theft, forgery or any other individual
specific act, the prosecutor can examine
into the character of the Dept. in the lat-
ter not exhibited evd. in support of it.
Wh. 224. Bul. 296. Pra. 7.

For the evd. wd. be irrel-
evant since the particular act only is
not - evd. conduct or character of Dept.
is put in issue by the prosecutor.

And even if the Dept. has the
doubt in evidence, but as the prosecutor
cannot examine as to particular facts
not alleged in the complaint, but as
to the genl. character only,

In the Dept. cannot be supposed to be pre-
sented to disprove particular charges not
put in issue & with notice. And where
his character is not put in issue by the
prosecution there is & can be no local no-
tice of them. Bul. 29. Wh. 224. Pra. 7.
& see evd. 146.

But in criminal prosecutions in wh. the Dept. is
guilty character is not in issue, he is indulged
in proving that his genl. character is good.
Wh. 224. Bul. 290. Pra. 7. ev. 8.

24. On a prosecution for theft & carrying away
&c.

This rule is founded on the benignity of the law
towards persons accused of crimes. So it is
in strictness no more relevant than contrary
to the rule in the first instance on the other side.

This indulgence was formerly allow-
ed in gavorem vite i.e. in capital cases,
but it is now extended to cases not capital,
or misdemeanors. (11 Mod. 202. 2 Lev. 141.)
where the direct object of the prosecution is
to punish the offender & not merely to col-
lect a penalty. 13 Mod. 174. 203. 18 J. 392. n.

It is not allowed in actions on infor-
mation for mere penalties inflicted by
local Statute. These being regarded as not
purely criminal proceedings or as direct
prosecutions for crimes.

Black says indeed that the rule extends to
no other than prosecutions for offences in-
curring corporal punishment.

But this does ex-
clude offences which at common law incur a fine.

See. 10. 8.

See also on this authority 20 J.
392. n. where it is supported as being a
proposition, & there are opinions differently
given to it. 11 Mod. 202. n. But there
appears to be no sufficient reason for such res-
triction. 13 Mod. 174.

Indictment
for
Rape.

On an indictment on a charge the prisoner
may give in evidence that the woman's character
is notoriously bad in point of chastity, or
that she had previous criminal intercourse
with himself, but not that she had such
intercourse with another. Phil. 140.

8. The Act is supposed to diminish the
probability of the violence in the two or
more cases, in the last it is not.

But in support of the criminal's character
evidence in a criminal prosecution must
be particular as well as general. i.e. the wit-
ness may not only testify in general to the
bad character but may give par-
ticular reasons for his opinion.

Phil. 141. 22. 23. 24. 25. 26. 27.

Thus a dangerous sort of evidence
tending to make an undue impression upon the
mind of the jury (art. 7)

But evidence of the character must be general
for the reason upon which (art. 8).

Phil. 141. 22. 23. 24. 25. 26. 27.

It now in the case of guilt is weak or
nearly presumptive. Proof in support of
the bad character is very important.

Sec. 8.

But in proportion to what is said above
many of the cases are little worth. Phil. 141.
22. 23.

Best. ill.
B. 2. 1. 11

Desa. cond. 8. 7. 102. i. fle. Hall. 342.

The contents cannot be proved
by parol evid. nor by copy. Dec. 20. 9. 10th 78.

Scripta Cod. 25. *McC. May*, 1807, 30 v. 2 Jo. 708.9
123.

Notes to instr. 5. lost or in receipt
of the adverse party, - vide last 37. 10. 19.

It is also, in a deed is attested by subscribing witnesses, execution can regularly be attesting, based by no other evid. than his. No. 11. 21. Goods.
 O. Long 25. 10. 1840. 25. 10. 1840. 25. 10. 1840. 25. 10. 1840.
 25. 10. 1840. 25. 10. 1840. 25. 10. 1840. 25. 10. 1840.
 he proved with his testimony, that it may
 be his final; his evid. is not of course con-
 clusive. For exceptions to this see 25. 10. 1840.

But the L. does not require that all the
the subject, and is, since the
the L. the L. the L. the L. the L.
a great many in secret. to show the ex-
that. the L. the L. the L. the L. the L.

Sum 6.
286
1865.

But there are exceptions as follows.

Perjury.

There is no prosecution for perjury, but witnesses are
subject to the conviction of any one. The same
rule will be one with us. one with. The rule
must be applied to the testimony of a
witness.

The rule notwithstanding I am absolutely re-
frain to witness, but there must be some
side-sustant evid. in addition to the testi-
mony of the one. 4. 2. 358. 10, 109. 109. 109. 109.
2. 109. 109. 109. 109. 109. 109. 109. 109. 109.

The right Treason also, & Betel Treason is in mis-
division of Treason, & witnesses are required by
law. Sup. Court. First of Feb. is yet to come. O.
Feb. 7. L. 240.4. Marshall, S. 1/2. W. A. ...
Bl. 9807. ... 88. 87. n. c. 3 Bl. 87. Phil. 108.

There is again reason concerning current coin
counterfeiting in silver - ^{is} silver - A number of the
S. B. & Co.

That this was not the real ϕ ; to L. but by S.L.
it was not required.

And in favour of stat. 77th. 3^d. with wit-
nesses must testify to the same overt act, and
if witness can't be convicted, unless in con-
clusion in favor of it. - or one witness may
testify to one overt act - another to another.
1 Mo. 344. 21. 34. 4 Phil. 557.

In the Constitution 4th 3^d Sec. 2. with wit-
nesses must testify to the same overt act, in
presence of the jury in open court. 1 Mo. 344. 21. 34. 4 Phil. 557.

The Rule, notwithstanding requiring 2 wit-
nesses in cases of Treason extends only to over-
t acts of Treason - collateral facts - in facts
not constituting or tending to prove a overt act,
may be established by one witness - as if the
prisoner is a natural born subject.

This distinction is founded on stat.
of not on C. L. 1 Mo. 344. 21. 34. 4 Phil. 557.

In England also the taking the oath under which the
crime is alleged to have been committed may
be established by one witness - as if the
taking the oath don't constitute a felony
itself. 1 Mo. 344. 21. 34. 4 Phil. 557.

It is a Rule in C. L. and govern-
ed on the principle that governs in the case of
accusations, it is the Deft's answer is not ad-
mitted by the witness only. 1 Mo. 344. 21. 34. 4 Phil. 557.
For the answer being under oath, there
is only one oath vs. one - 1 Mo. 344. 21. 34. 4 Phil. 557.
See on above. 1 Mo. 344. 21. 34. 4 Phil. 557. Dec. in C. L. 18. Phil. 557.
1 Mo. 344. 21. 34. 4 Phil. 557.

But in our practice as the answer is not
in the Court. I will not obtain here I trust.
But by St. L. Court. no person can
be convicted of any capital crime, but upon
the testimony of 2 or 3 witnesses, say a that an
is a fact. The Court. Court, 170.

In construction of the Stat. it is not neces-
sary to suppose the testimony to the same fact &
facts - one may testify to one part of a
transaction - another to another - In the left
image of one may be direct - & that by other
circumstantial, or both may testify to facts
merely circumstantial.

In either of these cases if the witnesses
are credible & their testimony satisfactory,
they may convict. But 179. There is
no such Eng. Stat. as that of Court.

The declarations of a stranger are com-
monly no evid. made in Ct. & under oath.
By a stranger is meant one not a party
to the suit. Hence if even a judge or
juror is acquainted with a fact in issue, he
is to be sworn & examined in Ct.

He has no right to act upon
that knowledge in delivered in open Ct.
See 170. 2 Mod. 33. 1 Phil. 140.

It follows from this principle that a murder
could be testified to by one person if that
person had another say it in open Court. In fact, it
is. For the first witness won't testify
to the fact in question - but to the declara-

tion of another respecting it - & pt testimony is
not in pt. in some cases in course, as all that
is required to be. records - there can
be no cross-examination as to the fact in ques-
tion. Phil. evid. 47. Ex. 281. 2 R. 1274. 2 R. 1081.
2 East 275. 3 R. 21. Phil. 75.

Exceptions - It is the fact of its nat-
ure, or in common presumption, incapable of
positive & direct proof as a question of
custom - prescription, privilege.

1 R. 1413. 2 R. 11. 2 R. 1081. 2 R. 1081.
Custom is a local usage, prescription is a personal usage.

Then as a question of custom or prescrip-
tion we can be proved only by evidence of
usage - it may be proved by hearsay evi-
dence being immemorial or one can refer to
the origin or creation - i.e. a witness may
state that he heard from that person or
a line respecting, reputation of the right in
question but not what they have done
relative to quiet enjoyment & exercise of it.

Phil. 182. 9. 2 R. 15. 2 R. 12. 2 R. 1081. 3 R. 26. 1
2 East 52. 4 East 327. n. 331. n. 2 R. 1081.

Hence on a question respecting ancient
limits, a witness may testify what have
been, & existed limits & what persons
now dead have done relative to the former
existence of a wall or building in such
a place - as the latter do. be evid. of a
particular fact - & not of general repu-
tation. 2 R. 1081. 2 R. 1081. 2 R. 1081.
14 East 331. n. 2 R. 15. 14.

But the declarations of persons ^{now dead} living at
the time are insisted to make for them or
for others - is inadmissible - This restriction
applies to all persons who are in court.
Phil. 198, 80, 3.

And a declaration is upon the same prin-
ciple admissible in questions respecting rights
of way - as all declarations of all deceased
persons. Phil. 217. Sec. 12.

Upon a question whether a certain
piece of land was parcel of an estate,
declarations of a dead tenant have been
allowed as evd. This is similar to the ques-
tion of ancient limits. 1 T.R. 53. Phil. 187.
2 L.R. 37. Sec. 13.

Entries made by a dead steward of money
received in satisfaction of debts upon a waste
have been allowed to prove a right of soil &
upon the same principle as before laid down.
5 T.R. 121. 7 L.R. 55. Sec. 12, 13.

So entries by an officer now deceased of
a township of monies received & another town-
ship have been allowed to prove a right
of liability of a latter township - entries
having been made when disputes existed
& by persons who made themselves char-
geable for monies. Sec. 13.

as to interest in person see 5 T.R. 36.

As to declarations of a deceased witness -
when no dispute existed as to the boundaries of the
land. See. 1. app. 33

But entries made by one claiming to be the
owner of the land. & money pd. him by the
other. is no evd. of his title even as in
between other parties - he being interested at
the time of the entry to support his title wh. en-
tries sh. go to support.

Still notwithstanding, evd. of 3 declarations
of dead persons. owner of 3 land restraining
claimed by those who derive title from him is
always admitted.

2 T.R. 55. 1 Esp. R. 458. 4 Johns. 229, or 234.
10 Johns. 338. 1 Phil. 193. 5 T.R. 123.

In questions of pedigree also, if 3 declarations
of deceased persons, who from their situation
were likely to know the fact. may be given
in evd. - as, facts of this kind are frequent
as to be proved in no other way - as declar-
ations of deceased persons upon questions of Legitimacy
- whether a child was born before or after
marriage. 1 Bull. 14. 4 Esp. 384. 3 Phil. 174. 80.

11 East 140. 6 Esp. 591. 8 T.R. 330. 3 T.R. 119.
3 Bull. 112. 294. See. 11. 14. 18 & 19.

But the declarations of deceased relations are
admissible only when they are supposed to
have been made with any interest or bias
of 3 party who made them. 14 East 331. no. 1 Phil. 178. 178.

Next, if made in relation to a suit or con-
troversy contemplated or depending - Tho there
have been some contraries of opinion on
the point - Co. 594. 2 Feb. 687. 3 March 49.
11 East 531. n.

But declarations of deceased parents are
not allowed to prove non accept during
wedlock - This is forbidden by considera-
tions of modesty, decency ^{morality} & policy. Par-
ents can't thus bastardize children even
after wedlock - Co. 594. 2. 2 Bul. 112. 13. 182.
Phil. 180. 8 East. 202. 22. 12. 782. 11 East 155.

Declarations of mere strangers - as deceased nei-
ther are not allowed in genl. in ques-
tions of pedigree - as to prove the time of
birth or marriage - for they are not
supposed to have the best means of know-
ing. 3 S.R. 723. 1 Hen. Hall 3M. Phil. 180.
14 East 330. Maule & Selw. 689. 2 Bul. 195.

But a decln. of a deceased surgeon as to
time of a birth who he attended if verd. it
stands - for he is supposed to have the
best means of knowing the fact. Phil. 180.
11 East 120.

But the genl. reputation of a family in
place to the one belongs in admissibility when
his pedigree is in question - Tho 3 declarations
to which Corp. belong, to 3 genl. rule are not

and whether G. S. is son of J. S. Wood 11.

The declarations of a relation are not admiss-
ible if he is living & can be produced.

It is not then; but evd. he shd. test-
ify in Ct. 2 Stra. 927 Bull. 119, 1 Campb.
787. 1 Phil. 176.

To prove the state of a family as to marriage,
births & deaths - declarations of deceased
persons likely to know & exact & good being
are good evd. - as to prove when a man mar-
ried - what children he had, - whether such
a member of his family died abroad -
what is the age of a child. 4 East 331, n.
2 Selw. 684. Bull. 294, 5. 15 W. 338, 85. 12 Ga. 14.

In these cases also a recital in a deed or
special verdict stating pedigree - the
relation of other members of family -
Monumental inscriptions - Herald's books
entries in a family Bible or other books
or statements in a will & when are good
evd. These being all in the nature of dec-
larations out of Ct. for they are not under
oath.

No statements in a will made by an ances-
tor, tho' will was afterd. revoked.

Bull. 294, 5 & 2. 338. 1 Phil. 175, 10. 11 East 308.
15 Ves. Jr. 144.

As engraving on a ring, where it can be evd. -

But hearsay and, if not allowed in some
place of long birth - for it may be
proved by other means. 30th. 77.

8th. 50%. 1st. 8th. 2d. 21. 5th. 0th.

if then the question is, whether it was born
in such a place - & second of deed and
not not not not, for it may be
proved by testimony of the persons living.

in other cases than those of pedigree a
memorandum made by a person in course
of his business or profession is allowed
as evd. of fact. Bull. 282. 2d. 1. 29.
1st. 24. 30th. 1st. 1st. 1st. 1st. 1st.
as to delivery of beer - 1st. 1st.

This is in nature of hearsay - but it is
not under oath - yet it is distinct from the
hearsay with regard to pedigree.

A written memorandum made by a party
to an act may be allowed in confirma-
tion of testimony of a witness - as a
witness testified to delivery of goods - & entered
by a party. 1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st.

Whether entries made by parties them-
selves are ever of themselves evd. in fa-
vour of a party making them so. 1st. 1st. 1st.
It is not of itself evd., but it may be corroborating &
confirmatory evd. 1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st.

In criminal cases the rule is somewhat more strict than in civil - yet there, hearsay may be allowed by way of inducement - or by way of illustrating evidence. *McCall. 14. 284. 29; 9. 301. 30. 3 Bull. N. B. 294.*

But there is another important exception to the Genl. Rule excluding hearsay evidence in cases of murder, & it conceives in all cases of homicide - It is this - The death of the person slain under the apprehension of approaching death, may be introduced as evidence of the principle of the Genl. Rule imposed an obligation to speak truth equal to the solemnity of an oath. *1 H. 499. 2 B. 150. 1 East ^{2d. 4th} 338. 1 McCall. 281.*

The principle on which this is allowed is different from that in which it is allowed in cases of perjury - & when they can't be proved any other way.

But the death of an attainted person or felon can't be admitted - for no credit can be given to his words, spoken under oath - since all credit is taken from him. *McCall. 287.*

2 B. 10.

But the death of persons ^{mortally wounded} ~~thus~~ ~~murdered~~ must have been under the fear or apprehension of death - Scrup not allowed. *McCall. 283. 5. Leach. Cr. 10. 30. 31. 32.*

The person need not, notwithstanding exist^{ing}
in apprehension of death if it can be deter-
mined from circumstances of the case.
East. Mich. 353. 1 vic. 1. 383, 383. Leach. 6. 6. 583.

The question, whether a apprehension of death
exists or not is a preliminary question to
be decided by J. & Ct., to determine whether
declus. shall be allowed or not. Leach. 6. 50.

This is analogous to the admitting a case
upon J. & Ct. of a decd. of mind little said
on this point, but J. & Ct. take these to be the
rules from the nature of the case. The de-
cision of J. & Ct. is not conclusive on J. & Ct.
if J. & Ct. say y^t a apprehension did not
exist yet J. & Ct. may say contra.

Mich. Hil. 383. 6. Leach. 6. 50. 583.
583. & not regard J. & Ct.

As to in Civil cases, the declus. of J. & Ct.
under the apprehension of death may
be allowed. 3 Burr. 1244. 58. 6 East 188.
Mich. Hil. 383.

In a subseq. trial what a witness had
testified in a former action where the
same question was in issue, may be in-
quired in. If it be between the same
parties, for here the witness might have
been cross examined & was so. Mich. Hil.
383. 5. Mich. 383. Foster. 1. 1. 337. Pra. 60. 2. Hawk. 608.

But it is not held in criminal cases, & reason of the
majority of the L. in favour of criminal. Pra. 60.

But what an accompanying witness has testified on a previous trial, shall not be allowed, if induced to abscond by him - & he ed. not on due diligence be found, - his testimony may be admitted. Kellogg 55. 1 East 373. 1 Root 76. 2 Hawk. 607. 1 Mc. Hall. 285.

That one of the parties has acknowledged relative to the matter in issue - may always be proved vs. him on trial. This does not come under a former rule respecting hearsay evd. - for it is not exactly in the nature of hearsay evd. not being a decln. of strangers. 7 T.R. 863. Pica. 16. 1 Phil. 76. It is rather an admission.

These confessions are not, notwithstanding, conclusive, - for he may on trial prove that his confessions that he then made were not true - as if Deft. has confessed indebtedness - he may still deny - by proof yt he owed nothing. 1 B. & P. 49. 10 Mass. 39. 1 Phil. 74. 8. 80.

It is a written acknowledgment, not under seal conclusive - for this is considered in the nature of a verbal decln. - & tho it is presumptive vs. him - yet he may contradict it by proof - as in a bill of lading - as if goods shipped are in good order, - here he may prove yt they were not. 10 Phil. 74. n. 7 Mass. 297.

He, notwithstanding, who contradicts his own writing - takes a great disadvantage.

The confession must be taken together, i.e.
all that was sd. at 7 time, 1 Phil. 29, 80.
East 4th 21, 1 Campb. 439, 3 Campb. 215.

But altho' all 3 accompanying confessions & qualifying declns. must be proved together - yet 3 juries are not bound by whole - but only so much as they believe.

A party never is allowed to prove his declaration in his own favour, nor may they constitute or make a part of 3 juries, as if they were a party - here declns. of 3 juries must be allowed to show that slander was made & for what purpose.

It seems it wd. be impossible to prove 3 tender since 3 more offer of money without any decln. is no tender.

On the same principle an act which of itself would constitute an assault may be declared to constitute no assault. 1 Mc. Hal. 373, 374.
East 188, 1 Johns. R. 54, Esp. 312, 1 Ald. 3.
Thacker. 173.

And in a single case, that a party may be proved to have sworn in a former action, may be proved in his own favour. This is a case of action for mal. prosecution - as if A. sues B. in such an action. B. may here give in evd. that he was testified before a grand jury on 3 prosecution vs. 3 juries, for the great injustice might be done to those unfortunate enough to fall in criminal prosecution 25, 2, 396, 8.

10 Modern 216. Bull. N. C. 14. v. 2. 350.
See "Mal. Prose"

As to what; Deft's wife now testified as
she was also in, proved in his favour
if she were examined as a witness - & this
on principle of necessity to prevent in-
justice from being done as in former case.
She is not a witness to her husband.

The confession of a party on record may be
proved or disproved - whether he is sued in his
own capacity or as trustee or executor or
agent - for he is party to the record in either
case. 7 N. C. 663. Phil. 2. 10. 10. 10.

And on the other hand, a declaration of a party
having a real interest in a suit - may
not make a record - may be proved or
disproved on record - as in debt or
for money to be made to D. &
confessions are evid. for Deft. for he has
been party to record - his wife is not
evid. 11 East 378. 89. Phil. 2. 10. 10.
10 East 395. 3 Campb. 463.

And the declarations of strangers made in pres-
ence of a party & not contradicted by him may
be proved vs. him for his silence may be in-
ferred into an assent to the truth of the declara-
tion if he acknowledges the truth of the facts as stated
him - it wd. be a virtual confession of them.
Rea. 16.

But the declarations of a stranger in ab-
sence of party are in fact, no evd. as to
the person can't testify as to the
of another - This was refused in an action for
the wages of the wife - but in a suit for the con-
veyance of the wife of debt. were not allowed
if it wd. seem that if there were any case in
ab. it wd. be it wd. be in this. in 1812. 1084.
6 S.R. 680.8 11th Dec. 577. Dec. 16. 17.

And even in an action by husb. & wife in
their right as exors - confession of wife in
and after coverture can't be given in evd. for
during coverture her powers of exco. are suspen-
ded entirely - so that were she to acknowledge
after marriage receipt of debt. it wd. not be
evd. if she had made such confession - before
marriage it wd. have been - for her powers were
not then suspended, suspended, not in operation.
6 S.R. 084.

The acknowledgment of any individual member
of a corporation - aggregate - not in the exer-
cise of its corporate duty can't be given in co-
v. - co-insurance - for an individual is not
known as a member of a corporation - unless
he is in some exercise of some duty of that
corporation. Post 44. 3 Dec. 443. Phil 74. n.

But where a wife, in transactions usual
made by wife, makes a contract by con-
sent of husb. if she makes any decln. concern-
ing it contract at any time - they are evd. in such
cases as a contract for nursing a child. &c.

52. 1850. 142. 35. 2-1.

This single case is a departure from all
rules of evid. for why shall a subject. be
in admittia here more than in case of wife's
wage? There is no more reason in present than
in former case - but on other hand much less.
She is considered as agent for her husband in this
case.

It is a genl. rule of decl. of a
serv. or agent - if made at the time of trans-
action - & in relation to it, are allowed as evid.
for or vs. a prisoner - but if made at any other
time they can't be - for in one case they are
part of res gestae - in the other they are not
as serv. delivers for his master a writing - in
decl. at time relation to it - as that it was
an escrow - or an absolute deed, may be
given in evid. They are part of res gestae.

3 D.R. 455. D.R. 640. 6. 1 Phil. 71. 55. 8.
2 Phil. 605. 8. 5 D.R. 12. 135. 2 Cam. 56. 55. 255.
5 H.M. 20 D.R. 127. Rea. evid. 18.

The same distinctions hold as to decl. of an
interpreter made at time of a contract, he
is a party by whom he was employed.

But his declarations as to a contract made at
any other time sd. not be allowed as evid.

Phil. 71.

According to this distinction - decl. of a Bank
rust up to the reasons of his leaving home made
at time of absconding - may be allowed as
evid. with regard to his Bankruptcy in an

action or in agency. It is part of the
Res gestae. - Hence it made at any other
time, for it is then no part of the Res gestae.
It is necessary in order to determine whether
it is material to an act of bankruptcy, to as-
certain the true reason of his absconding. We
can see better reason in his case than in
any other. 12 B. 376.

In an action of assumpsit on a policy of insur-
ance on the life of his wife - & declar. of the
wife made at the time of making the policy -
not concealed from & under writer with re-
spect to the state of her health at the time
of effecting the insurance - are good evi-
dence. 12 B. 376. for the nature of the complaint
can be known in no other way. Sometimes
12 B. 376. 1 Phil. 187.

As to in a prosecution for "Bastardy" ei-
ther civil or criminal - & declar. of the party
made at the time, & relative to his
bodily suffering, may be admitted but no
subject. declar. - for here the state of his
bodily pain & suffering can't be known by the
jury, unless by information wh. they may de-
rive from the person himself. This exception
is followed from necessity of the case. 12 B. 376.

When a party to a suit stands in the place
of another & confessions of the other are good
evidence. 12 B. 376. as ex. sup. in right of his
testator. The confessions of the testator are good evi-
dence for they do. have been good vs. the

person himself had he been living, & a party
10 Johns. 377.

Now, principle of this rule is - as these de-
fendants have been made vs. of person himself.
they shall likewise be good vs. him who is
virtually himself - in another name.

But there are cases much stronger in
this - as in an action vs. a ship, for an escape.
& confession of party, escaping - yet he was
not a party for wh. he was committed are al-
lowed - for a ship becomes liable for
same debt.

Now, principle is - as the
confession wd. have been good wd. it was
by making a confession of a debt, it
shall now be good to a same point. But
must be proved to show damage suffered by
escape. 4 D.R. 436. Peake R. 63.

So too vs. a ship, for false return of
inventories "est" - a confession of party that
debt for wh. he was sued was due is good
& for same reason, it is necessary to prove
debt, to show damage sustained.

4 D.R. 436. 1 Esp. R. 169. n.

It has been once held that if a ship is
sued in ex. for an escape suffered by its crew
under a ship, & confession by a crew under a ship, return-
ed to the time of escape, might be allowed
in evd. - but it is now determined - that the
confession of a crew under a ship shall be confined to
time that escape was made.

(Ld. R. 190 Pea. 17, 18. overruled) 1 Campb. 589. 191 n.

Pea R. 65. 1 Phil. 76. 10 Johns. 478. 1 Esp. R. 168. 2 H. Bl. 279.

So too where a party claims or justifies, by
evidence of a 3d person's title - & declares
3d person is - & there is good evidence, with
no triable issue. So the justifier under title of
1st 3d - The declarer is liable, tending to show
it is title not good may be allowed.

But it is a Gen. Rule - where there are
several co. debts - & declarer of one debt is evidence
is himself only - & of no weight as to the
others. With regard to 3 others his evidence is strictly hearsay.
Bull. 243. 1 Mc. Hall. 40. 269. Relyng. 18.

The Rule holds in Civil & Criminal cases.
In a joint debt vs. 2 - action vs. only - & de-
claration of 3 other as to the contract can be
admitted vs. him who is sued.

The Rule is then where there are 2 debt-
ors & declarer of one not sued is no evidence vs.
3 one who is. Turb. 62. 174. 203.

There is an important exception to this rule,
in an action vs. joint partners. For each partner
is cognizable of 3 other is evidence vs. him, & for
each is agent for both. (- in case of joint partners &
11 East 589. Ra. R. 16. 203. Whit. Pals. 209. Gilb. ev. 31. Phil. 72.3.
1 Taunt. 104.

In case of partners; even if the same
even after dissolution of partnership - for
the state is in same relation as at dissolution.
Dowd. 629. Bristo. vs. Wright. 3 Johns. R. 506 contra.

Joint & cognizable of one of the joint & evi-
dence, not being partners - is not evidence in

an action is & other - to prove & convict -
yet & contract being established such con-
cessions may be proved to take & contract out
of & what is Limit. - or for any other con-
cession in fact. - one of them for this, may use
acting agent for both. Doug. 629. or 632. Bea.R. 15.
205. 1 Phil. 72.3. 3 Day 309. 6 Johns. 267. 1 Taunt. 104.

The principle of & that of other & contract
being established - they are "graves" in
the nature of fact - it is a fact wh.
has & effect of a new promise - & act of the
agent & act of the.

But there is not in such a combina-
ble of crimes or offenses - for it to be
most mischievous to allow & conviction. &
these & confession of one & the other is not evidence
to prove & guilt of & other - The acts of each
are distinct & independent offenses.

But there there is an illegal combination of
several - & declare of one of them at & time of
transaction - relative to that act & motive or
design - are not only evidence vs. him - but
evidence also - & fact of & combination
being established - they being part of the
transaction itself - Part of & Res Gestae.
62 R. 527. 1 Phil. 73.4. 2 Day 205.

Now if made at a
different time - the case in Day is remark-
able - & it was an action for combination
to defraud & in case upon & inhabitants of
Boston.

if one of two deeds, suggests a default & ;
either blade to & action & declar. & ; declar.
at party may be given in evid. w. & ;
& ; verdict establishing & ; liability of both
must be w. both - so that & ; declar.
of & ; defaulted party are & ; declarations of & ;
evid. to & ; trial - for the & ; party, proved & ;
facts. Day 33.

In Criminal cases also & ; confessions or ex-
amination before a magistrate are good
evid. w. him on & ; trial before a Ct. of jus-
tice. - 2 Wash. 604, 607, 1 Mc. Hall. 42, 561, Kelyng. 18.
Rex. 19. 1 Phil. 71, 81. And it is now settled, & ;
confessions of a prisoner tho. uncorroborated
by any other testimony even in a capital
case are suff. to warrant & ; jury in find-
ing him guilty - tho. it was formerly held
insuff. in capital cases. - 1 Mc. Hall. 51, 273.
Fost. 243, Leach. 319.

But it is a distinguishing feature of & ;
law, that confessions & ; from & ; party by
torture - or promises of pardon (confessions of
guilt) can't be given in evid. w. him - It was
formerly & ; practice in most European states
to extract by torture or promises of pardon
confessions of guilt from & ; prisoner - & ; then
continue to manufacture use them to convict him.
- 1 Mc. Hall. 42, 44. Rex. 19, 20. 2 Wash. 204, 211.
(Kelyng 18 extra not law now) Leach. 122, 126, 248.

On this principle it is that confessions of & ;
party under & ; idea of it is become & ;
evid. in cases of & ; King in cases of & ;

public in U.S. can't be not in on
trial to establish - fact of his guilt, &
thereby to secure a conviction. -

Each. 636.

But, a discovery of material facts, result-
ing from a confession thus obtained, is good evi-
dence in itself - & partly in confirming statements
& facts are in a certain place - & they are
found there - The statement of their conceal-
ment - & fact of their being found there are
good evd. to show his knowledge of & con-
cealment - & presumptive evd. of his partici-
pation in the theft - but his confession of
committing the theft can't be evd. in him-
self. In such cases there can be
no danger to the party making such confes-
sions - being convicted unjustly - even in-
nocent. - 1 Mc. Kall. 47.8. Rex. 20. Each. Cr. L. 199.

301.

By & Eng. State. 1 & 2 Phil. R. Gary & con-
fession in examination of a prisoner taken
in writing before a Ct. of inquiry may be
given in evd. even in cases of felonies him-
self on trial - There is no such Stat. in Conn.
- 2 Wash. 604.5. 1 Mc. N. 37.5. 284. 312.

This is one of those states wh. is to be deemed
modern - & ergo not strictly L.th It is
since the reign of Hen. 8. wh. is the bounda-
ry between ancient & modern states &
between those wh. are binding here & those wh.
are not.

character to avoid liability arising from it.

2d a person living with a woman & holding himself out to the world as her husband - he shall be liable for her contracts in the same manner as if they were actually married. - 2 Esp. R. 537. Bea. evid. 20.

In these & all analogous cases & act units to a confession & to confessions are conclusive upon him.

Examples of analogous cases - If one person treats with another in a particular character - & derives a benefit from it - he shall not afterward deny it to avoid a liability founded on that character. Thus 1st. rented globe land & B. & incumbent - in an action for use & occupation - it was not allowed to disprove B's title by proof of simony - again A. leases land to B. - B. & lessee shall not in ejectment deny A's title in proving mortgage. So where one treats with another as a partner, he shall not deny that he is partner, to avoid his contract. 5 T.R. 4. 420. 6 T.R. 180. 700. 751. n. 2 N.R. 200.

Presumptive Evidence.

A presumption is an inference of some particular fact from those that are proved or admitted.

Direct Evidence that wh. can't be true consistently with the non-existence of the fact wh. it conduces to prove.

Presumptive Evidence is that wh. is consistent with the possible non-existence of the fact wh. it conduces to prove.

Ex. of Direct Evid. - A. testifies, & he saw B. take & carry away goods from the house of C. But B. testifies, & he says the stolen goods were found in the house of D. who was not the owner - or that B. came from the place at or near the time in which goods were alleged to be stolen. This is presumptive evid. & fact is negat. by B.

Dec. 21. 1841. R. C.

These presumptions of fact from fact may be rebutted by contrary testimony - but till they are they must have some weight in favour of the party proving the fact. Dec. 21. 1841. R. C.

This doctrine of the C. L. of evid. with respect to presumptive evid. has been extensively applied to the quieting of property.

or sufficient. or long standing, - where the sub-
ject is not within our stat. Limitation is.
or quieting & long, uninterrupted quiet,
possession of any incorporeal hereditament.
Long, undisputed, adverse possession or enjoy-
ment of a franchise or easement affords a
presumption that it has a legal founda-
tion, & in such cases even records may be
presumed.

The fact to be presumed is
submitted to the jury under the direction of the
Court. - 21.2. 12 Co. 5. 2 Selo. 80. 91.

1 Longb. 103. 210. 1. 2. 399. 8 East 208.
2 Do. 330. 2. 399. 1 Burr. 400. 2 Do. 200.
4 East 249. 8 Wils. 301. 1 D. & R. 400.
2 Bland. 175. n. 2 D. & R. 208.

So a grant of Pastures may be presumed
from long use - & a recovery in an action
not may be supported by it. 1 Burr. 1018.
3 D. & R. 189.

So deeds of land have been presumed
after long & quiet possession. - accom-
panied with other circumstances making
it probable that such a deed once existed.
3 Wils. 399.

So of any other incorporeal heredita-
ment of whatever kind - This presump-
tion is of late treated as conclusive - tho-
formerly it was left to the jury to infer
fact.

In order to warrant the jury in finding a deed
in pursuance of such evidence it is not enough
that the deed be in the right place. The estate
ever had a legal foundation or foundation.
In a leading case cited in Longb. 103. 210.

Heene v. Hull & Kingston. - Ld. Mansfield said
that if there might become one thing in some
part of it, & another in some in position in
that case - in the same way an agreement, or
250 yrs. # Kingston upon Hull.

I have limited the rule to incorporeal rights
because if it were limited to corporeal
rights incidents - but the same principle
applies to one as to the other, &
on this principle the rule is founded.

The right to the use of a stream of water
is an incorporeal hereditament. - A. owns some
500. below B. & directs the water going
land of B. & B. but object to it during 20 yrs.
B. can never after support an action vs.
A. for the diversion. - Again if B. had
by means of a dam overflowed land of A.
for 20 yrs. A. not objecting during that
time - A. can afterwards support an
action vs. B. for damage. And the same
are found to preserve that B. acquired
right to overflow of land of A. in the man-
ner he has done. 6 Inst. 206. 2 Sand 175. n.
2 Inst. R. 584. Lamb. 63. 1 B. & P. 400. 2 Day 444.

Right of way is another incorporeal right.
If then A. has enjoyed uninterrupted for
20 yrs. - a right of passing over the land of
B. - in an action brought by B. vs. A. & jury
will presume B. was bound to do so that B.
promised a right of way to A. by virtue of which
he has since enjoyed.

The doctrine of presumption is extended to a variety of cases - If a bond has been for 20 yrs. witht. payt. now it is presumed that it has been wholly paid - unless the obligor can show some good cause or reason for delay - some reason may be not lawful make demand of payt.

1 Burr. 434. 8 Mod. 278. Rea. cont. 24. 1 Bl. R. 532. 3 D. W. 395.

4 Burr. 1963. 1 J. R. 270.

The consequence is that after such a lapse of time the onus probandi lies upon the obligor for allowing it to lie for such a length of time witht. making any demand - affords a strong presumption that it has been actually paid - or that he has released the obligor - ib. ante.

So in one Eng. case wh. the bond had run only 16 yrs. other circumstances were allowed to go to & jury to fortify presumption.

Exp. 226. or 254. 69. 109.

In Const. there is no Stat. of limitation with respect to bonds, & for this reason, rule is made a sollicitudo to them & it is made for the purpose of substantiating what is a Stat.

This presumption may be rebutted - as if the obligor was showing the time out to the country - an alien enemy. - Stra. 562. Exp. D. 226. or 254. 69. *

So too if the obligor can prove any recognition by def. of existence of debt - or if he has paid interest, or acknowledged existence of debt within 20 yrs. before time of bringing action. (Exp. 214. Rea. 24. n. above *.)

Stra. 528. La. Rd. 1370. Rea. 24. n. -

The presumption may be rebutted by
proving a prior imperfect suit on the
same debt - & it matters not what reason
was - if a question be as to when a demand
made within that time & is evd. of its exist-
ence of the debt at that time.

19.R. 271. Esp. Dig. 227.

Now as to the question, how far an endorsement of suit made within 20 yrs. is
evd. of its existence of the debt - the rule is
if there is an endorsement made by the party
himself - before & time within wh. a pre-
sumption wd. have arisen - & endorsement
is good evd. of part payt. - so in evd.
is supposed to have made it - for the
purpose of it is becoming evd. in his fa-
vour - but on the contrary under a diff.
case. 2 Stra. 826.7. Ld. Rd. 1370. Lea. ex. 243.
Esp. Dig. 226.7.

But if made after, it can't be allowed
in his favour - for so far from rebutt-
ing a former presumption - it confirms it.
In its nature.

In Count. there is no need of such a
presumption. There being a Stat. of
Limitatus with regard to the time of suing
on a bond.

If a creditor gives a receipt for an in-
stalment of a debt payable by instalments
tis evd. of payt. of all prior instalments
unless rebutted by contrary evd.; for if
a prior instalment had never been paid, tis
not probable that a receipt wd. have been

given with the mentioning time is important.

Is of a lease, 3 Bl. 407, 371. Corp. 103. 1 J.R. 399, Dea. 24.

Exp. 226 & 63. Sta. 562.

There is subject is within and limits of Limitations - this presumption can't operate on a time less than is prescribed by Stat. for it wd. be a virtual destruction of it. - Corp. 214, Dea. 24. n.

Thus 3 Eng. Stat. gives right of possession to Z dispossa after 20 yrs. quiet possession. - if then H. disposses B. & holds of Z. there can be no presumption in favour of H. - for this wd. be an evasion of 3 Stat. or in effect making a new Stat. & one more strict - Stat. can't be allowed.

so the Stat. in question with regard to bonds restricts the time of bringing action to 17 yrs. - if then Z. brings an action on a bond - & B. proves he demanded for 16 yrs. - Z. shall not collect him, & for same reason as before.

Length of possession alone can't be a ground for presuming a title to land or to any thing - but an incorporeal thing & applies ^{only to} Stat. is within any Stat. of Limitations.

Secus, the rule might repeat all, saving of such Stat. wh. can't be allowed - The Stat. of Limitations in Eng. gives right of possession to Z dispossa after 20 yrs. quiet poss.

But there are several savings in the
statute in favour of different persons - as Tenor
cetera - &c. &c.

If your court is allowed to bring an
action at any time within 10 yrs. after her
death - tho' if estate had been in & possession
of & disseisor for 20 yrs. or more during
her coverture - If then B. enters & lands of
A. continues in & quiet enjoyment for even
30 yrs. during & coverture of A. yet if A. with-
in 10 yrs. after her death bring an ac-
tion to recover & possession - she shall pre-
vail notwithstanding & lapse of time
during wh. B. has enjoyed. For this
length of possession shall be no ground to
assume a title to defeat & saving of it
made expressly to protect & rights of
those who do not otherwise be protected.
2 Inst. R. 607. 2 Day. 523.

If too were the plaintiff an infant - for
case will fall under & same rule - & will be
decided on & same principle.

Still - Length of time connected with other
circumstances of presumption may be said
of right of possession - as it establishes some
facts showing title, but can't prove some par-
ticular fact necessary to constitute complete
title - here possession may supply it by pre-
sumption. - As H. if purchaser of lands
taken & sold by collector - & continues in pos-
session 20 yrs. - H. shall have title - as if he
had actual sale by collector. - Here
law may presume & particular fact nec-
essary to complete title - from & possession of H.

series of time - & so even more his, & so
not 5 yrs. - Nelson. L. 607. in N. H. S. Chap. 379.

The distinction then is - if a man's subject
matter is not within any Stat. of Limit-
ations, - ^{as in personal rights} long & quiet possn. is conclus-
ive evd. of title in favour of possn.
- but where it is within a Stat.
it is not, - as personal rights are within &c.

But in this case may give in
evd. possn. in connexion with other cir-
cumstances to induce a jury to believe
in existence of a good title. On this prin-
ciple in Eng. a com. recovery has been
presumed to supply a defect in a
chain of title.

Again an actual ouster of one of two
Jt. Tenants may be presumed by long
undisputed possn. of one with. under-
lying any account - & here a principle
applies in its full force - & case not
being within any Stat. Chap. 207.

This long uninterrupted enjoyment of any
person must have been adverse (i.e.) it
must have been such as is inconsistent
with a right of any other person - but if
a possession, or enjoyment, were consistent
with another's right - it can be no evd.
vs. that person. - for here is no requi-
sition in the possession.

that in common case of lands after long
possession. - Hills & deeds for have been pre-
sumed to supply a defect in title.
1. Hays. 377. 2. Count. R. 107.

Kind of Evidence.

All Evidence is of two kinds - Written &
Unwritten or Parol.

All written evd. is of three kinds.

I. Records. - II. Public documents not
Records. - III. Private Writings.

A Record is a written memorial of the Law
to a state or of the precedents of Justice
according to the Law & customs of the state.
Gill. 48. Bull. 233. Peak 52.26. - Post 84.

Among the written memorials of the acts of
the Legislature & of the judgments & Judicial
proceedings of Cts. of Record - are den-
ominated Records. - Gill. 7. Pea. 26. Bull. 221. 233.

A Record can't be contradicted - & this rule
is founded on the solemnity wh. it is at-
tached to writings of this nature. Pea. 27. Bull. 221.

If, notwithstanding, a Record is made erro-
neous or defective by any unauthorized
attor. may be proved by parol evd. -
but evd. can't be admitted to prove any
alteration made, to make it correct - to

comp. in it to truth & facts of case.

Bl. R. 654. & Burr. 2207. & Tra. 210. Dec. 28. m.

And undoubted evd. may be admitted to prove that an apparent record is no record in fact, but a forgery - for even a person might make evd. for himself. Post-20.

As too the false date of a writ ^{in vacation} may be proved - & true time of issuing proved for purpose of furthering justice & to prevent an evasion of provisions of any Stat.

"in vacation juris
sistat equitas." It is a Genl. Rule, that fictitious in-
to. may be contradicted in matters of justice.

As Stat. of Limitations requires action on contract to be brought within 6 yrs. If writ bears date within time - evd. may be admitted to prove that writ actually issued after expiration of time. ^{to} seems there wd. be an evasion.

2 Burr. 984. & Dec. 1241. Dec. 27.

Record being a precedent or memorial open to all - it must be carried about from place to place - Ego - a record must be proved by a copy duly authenticated - these being best secondary evd. G. B. 8. Bull. 225. 6.
Dec. 28.

Induced it is a Genl. Rule that when a writing is of a public nature wd. have been evd. a copy ^{duly} perfectly certified shall be, & in reason given before - these being

in their nature public - but in themselves
produced by private persons. 3 Balk. 154.
Doug. 572. 1 Mo. & 355. Dea. 91. &

But there are some Records wh. require no
proof at all - such as public acts of
Legislature wh. require none in State in
wh. they are enacted. - Hence they are
read in a printed Stat. book - not as
evid. but as a supposition of existing & man-
ner of & c. The Judges are suppos-
ed to know, as they are bound to know
the Law; - & therefore there is no necessity
of proving them - but there may be
need of refreshing their memory.

3 Balk. 154. 1 Mo. Ball. 356. Le. Rd. 154, these belong above
Dea. 27, n. Gill. evd. 10. Bull. 222. 225.

But Private Stat. must be proved as
facts like other Records wh. relate to
private Rights - & by copy, for they are
not part of public L. & land is con-
sequently & Judges are not bound to
know them & notice them unless proved.
Gill. 12. 9. 12 Mo. 125. Bull. 222. Dea. 27.
(in Private Acts see Munic. L.)

But a printed Stat. book is no evd. of a
Private Stat. - it is nothing but a private
unauthenticated copy, & of no more validity
than a private writing. Bull. 225. Dea. 27. Post 67.
(Gill. 13. Le. Rd. contra but now overruled)

If notwithstanding a Legislature declares that
a Stat. in its nature private, shall be declar-
ed public - it shall be so taken - and

here it has said that a stat. book is good evd. if
it. But I say rather rather in this case
there was no need of proving its existence
stat. - for the Ct. are bound to know it - & to
treat it as they wd. any public stat. Rec. 27.

Now wd. it be enough to read it spec-
ially tho. if not declared public it must
be. See "Pleadings." Ex. A. Stat. for a private
village library.

Copies of acts of Legislature are cer-
tified by a Secretary of State. He is
officer & is appointed for that purpose, &
unless so certified they are no evd.

Gill. ev. 19 analogous. 1 Laid. 146. Rec. 201.

Copies of the Records of the Ct. are cer-
tified by the Clerk of the Ct. if the Ct. have
one - & if not by the Justice himself.

In both cases they are to be authenticat-
ed by the seal of the Ct. if there is one
seal not.

And all Cts. are presumed to know the
seals of all legislatures - & of all oth-
er Cts. of the U. S. & of all the States
of the Union, & ~~and~~ no other evd. is re-
quired than the seal itself.

Copies of Records under seal are called
exemplifications. Rec. 28. 10 Mod. 128. 6.
2 Term. R. 85.

and in some cases seals of
public credit are full proof of instru-
ment. to wh. it may be affixed. Gill. 19.
1 Laid. 1. 40. Black. 411. ib. 500.

So too a public National Seal proves itself true-
out & would in every Ct. in every station on
the globe. - Post 78. =.

But the seal of any Ct. of a foreign country, if
it be a municipal Ct. is not evd. of itself
- & it is no medium of proof in any Ct.
of the existence of such Ct. in a foreign
country. 2 Court. Dir. 85. 20 9 Mod. 66.

2 Branch. 187. 4 Dall. 416. Dea. ex. 71. #.

3 East 221 5 do. 471. 3 Johns. 310.

But a seal of a foreign Ct. of admiralty is
evd. of itself. It being established by the
T. of Nations. Post 78. Pa. 723.

The Stat. of U.S. & exemplification of a rec-
ord in any State to become evd. in another
State must be accompanied by a cer-
tificate of a judge or Presiding Justice,
or of the Governor - Chancellor - or Secy. of
State, - that the attestation is in due form
& made by a proper officer. Post 82.

7 U.S. Stat. 153.

But if same be copy or office book, not as-
certaining to Ct. of record, are to be att-
ested by a judge receiving them - & accompan-
ied ^{with seal} by a certificate of a Presiding Judge of the
County - or Governor or Chancellor - stating
that it is attested properly - & by a officer
appointed for that purpose - & in a form pre-
scribed by L. as in last case. &c.

There are four kinds of Exemplification.

- I. By Exemplification under a great ^{National} Seal in Eng-
not known here.
- II. Exemplification under the seal of the Ct.

there; & the "lost Record" can be made the
issue must be to the jury - & the Record must
be produced to them & sworn to in such case
will be admissible evd. to prove its former
existence. - The record itself by the supposi-
tion being lost - such evd. must be admissible
as ex necessitate rei. Pra. 29. 2 East 473.

Office copies are grantable only by an officer
to whom appointed for that purpose, & is evd.
of itself - & requires no proof. - The attesta-
tion makes it evd. per se - so indeed are all
copies but sworn copies wh. must be proved
as with. Post 31. Wood. 110. Bull. 229. Pra. 31. 3.
Gill. 23.

A copy ^{in form of an office copy} not certified by an officer not entrusted
with the duty is no evd. of itself.
But if it be sworn to, it may become
a sworn copy & be entitled to credit of a
sworn copy. Pra. 31. 2. Bull. 229. Gill. 23. 4. 6.

But the record in such case is available only
by a copy of some kind - yet if it is made
to appear that a record has been lost or de-
stroyed its existence may be proved in in-
direct evd. - Post 32. 33. 40. Pra. 28. Gill. 22.
Bent. 357. Wood. 117. Bull. 228. Bull. 228.

Where the record is recent notwithstanding,
there is no need of resorting to secondary evd.
for its abolition & etc. they will order a
new record to be made. This can be done
only where it is within the recollection of the
court.

And in genl. exemplification or copy to be
made must be a copy of the whole record - & not
of a detached part - for a construction
might be put upon a part sh. wd. be to-
tally diff't. from a construction drawn
from a whole record taken together. (2 Inst 66.)
"positur a scribis." Bull. 227.8. Epil. 17.23.

These Rules regard the writ - but it is
more important to enquire, - for X vs. Y when
a record is evid. in a civil suit.

Genl. Rule - a verdict or judgt. is, in
genl. evid. only between the parties to it rec-
ord or judgt. by privies to it - but not as
to any 3^d persons. For if a stranger to
a record were concluded by it - there wd. be
danger of fraud by collusion of the par-
ties. Post 53. 58. Bull. 232. Rea. 38. 64.
7 R. 112. 2 Mc. Nally 624.

It becomes necessary to ascertain wh. L. means
by privy, wh. exists in the four following cases.

1. Privy may exist between an heir & his
ancestor wh. is called a privy in blood.
Co. Lit. 352. 3 East 353.

2. There is a privy called a privy of Estate
& that wh. exists between Lessor & Lessee - Grantor
& Grantee - Receptor & Receptee - Attendants &c.
as if a record is conclusive on one person it shall be
conclusive on his Grantee in respect to a estate to wh.
he claims title by a grant. - Bull 232. Epil. 81.

Rea. 29. 30. 10 Co. 92. 3 do. 23.

3. Privy in L. as that between landlord & tenant - sometimes called privy in tenure.
4 Co. 124 a.

4. There is a species of writ called writ in
^{repente} ~~repente~~ as that between testator & exr.
and is called writ in exemption - p. 100.
p. 100. stands in 1st place in his testator. & is
one conclusion by and in estate etc. & con-
clusion for. These are 7 species of writs
for if 10. where 10. are 10. There are
other kinds of writs too numerous to be
mentioned here. - 10. L. 152. 3 East 153. 4 Co. 123. a.

4. Judgt. rendered directly on a writ coming in
question of 7 Co. in 1st competent jurisdiction
is ^{conclusive} ~~conclusive~~ as to parties to it & their privies
as to the subject-matter -
"Interest Reimbursed at sit final action."

8 Co. 2. 2 Bl. R. 527. Taunt. 232. 3 Co. 24. b. 10. 208
: 10. 187. 1 Lev. 235.

Since when final judgt. has been given in a
suit by a Ct. of competent jurisdiction it
can't be called in question but in the
course of L. & it can't be impeached in any
other way - as by writ of error. 13 Co. 100.
Directly arising out of it - as in common
law a ^{10. 10} ~~10. 10~~ for a new trial or an as-
sault & 10. 10. 10. 10.

It can't be impeached in any collateral ac-
tion in any original action. See 10. 10.
10. 10. 10. 10. 10. 10. 10. 10. 10. 10.
10. 10. 10. 10. 10. 10. 10. 10. 10. 10.
10. 10. 10. 10. 10. 10. 10. 10. 10. 10.

The Rule is, however, only on a final judgment.
i.e. in any original action & (wrongly said) in one
which ends on a final judgment - & it applies
to a second action as well as to one which
is given in the same suit or series
of cases. Thus if judgment has been given on
a first or second action - & a third - & so forth.
while it remains in force - can maintain a
similar or concurrent action on the same case.

2 Blk. 837, 1 East 340, 352, 3. 6 Allod. 20. 3 Wils. 240, 304.

6 Co. 7.

In such a case the way of taking advantage
of carrying a second action is, to plead the first
judgment by way of stop set - but the judgment
may be given in writ, under a general issue in
any other action - but must be pleaded by
way of stop set. For in the action of "Sett"
any thing which shows no indebtedness may be
given in writ, under a general issue. But if
some debt is shown as to any other action,
1 Dougl. 246. 1 Trep. 244.

If the right claimed in a second action is
not settled in a first, a judgment is not con-
clusive as to a party to whom it was obtained
in a subsequent action. - For the merit of the
cause having been never determined must be
again brought in question, - as if the first ac-
tion was misconceived - or if the first action was
proper in its kind - but some material allega-
tion was omitted. - In such case a right claimed in
second do. not have been decided in the first,
the grounds in the two being diff. 2 Vent. 169. Pen. 37.

Dayd. 112. 3 Mod. 1.2. 2 Mod. 318. 4 Bac. 116.7. Cro.E.
667.8.

So too a judgment on a plea is conclusive evidence
of the existence of a debt, & this whether rendered
on confession of debt. or demurrer or default.
7 L.R. 269. 3 Bull. 232. 1 Day 170. 34.5.

If then after a judgment rendered for the plaintiff
it appears that it was obtained by fraud
of the plaintiff or by perjury of a witness. yet
he shall not maintain an action to recover
or back money paid on yet judgment. 35.68.
7 L.R. 269. Day 130. 3 do. 30.

He can a debt. vs. when judgment is rendered
maintain an action for fraud in obtaining it.

The same rule also as to money
paid in money. 1 Day. 130 3 do. 30. 35.68.

There is a case in the books - a case of "Hosier
vs. the Bankers" in which an action was main-
tained to recover back money recovered in a Ct.
not having jurisdiction of the debt's defence. This
case says not the authority of the 2d Sur. 1002.
Mentioned in 7 L.R. 269. 2 H. Bl. 414. 35.

If a person pays money, or being sued
admits that he owes it & yet it is not
a judgment, he can't maintain an action
for recovery of it. The reason seems to be,
as it was voluntarily paid. & "volenti non fit ini-
uria".

It thinks it is paid because it was paid
voluntarily. 35.68. 3 do. 30. 35.68.

On the other hand there is a residue having recovered
part of his remedy, & attempted to proceed therein
 he can't maintain an action for residue. The
 decision is that part of conclusion exists &
 it is not due to him - but if he can't
 produce any more as to part - he may bring
 an action afterw^d. for that part - & residue
 of former judgment shall be no bar.

C.D.R. 607. Dec. 18. 6. 1850. 401.

But in application of 3^d point, while that
 a judgment for a debt in one action is con-
 clusive in his favour, is an action for
 same thing - There is a distinction
 between Real & Pers. actions. - Personal being
 all of the same degree - A recovery or bar in
 any action of this nature shall be a bar to
 any other action of a pers. nature for the
 same cause or thing. Dec. 30th.

In Real actions or actions, there are many
 degrees - some real actions are of a
 higher nature than others - & all of them
 higher than pers. actions. Stout 288.9.

Hence a recovery in a pers. action is no
 bar to a real action - tho relating to the
 same thing or subject. - Thus a judgment in
 "qu. cl. frigit" frequently is no bar to a real ac-
 tion to recover the same close. - Whether a
 recovery in any one species of real action
 is a bar to another real action of a higher
 nature - & reason is of some right can't
 from nature of case have been determined.

The immediate right is demanded in 2^d case
is right. 97 98. Bring an action properly
claiming 5 possession of a certain close. &
a judgment is rendered in him - this judgment
shall not be conclusive in him in an ac-
tion for some higher right.

And there is this diversity in application
of 1 Rule in that if no diversity in principle
for in every species of action, the Rec-
ord, so far as respects the immediate sub-
ject in issue, ^{in, first} is conclusive by way of bar
to any future litigation, whatever. 3 East 337.

Since if any record fact is distinct-
ly put in issue & found - 3 Record 4, 38 judgment
even in a personal action is conclusive - as
that fact once found so as to prevent
the parties from putting it in issue in any
other action - even a real action. 38 the
seizin of a d. a. was put in issue & found
specifically by 3 Record 4, - in then 3 same fact
was afterwards litigated & questioned in any
action whatever by 3 same parties or sides
in. 3 East 345. 354. 5. 8. 86.

Whatever point a record distinctly decides
is conclusive as to that point, but no
further.

And it. that to make a record in a former
suit conclusive upon any point in another
- it must appear that the point in both
actions is the same - & this must appear
even a comparison of records. so where
a writ has been issued in a suit upon a

given contract or upon a given hypothesis - and
 enters upon a same contract on the hypothesis.

Here the cause of action is plain in 2 cases.
 1st - minor admitted to be a slave or bond
 to act so - 2nd - first indent. is conclusive w.
 2nd action by way of 1st indent.

1 Egg. 2. 43. Dec. 37. 2. 40. 2. 24.

It is always admissible
to show by extrinsic facts that a subject
is controverted in the two cases in
a fight. *Ex. C. 35. 3 Lio. 25. 4 Bac. 17*

Am. C. 55. 1 Dec. 125. 1300. 17

$\frac{1}{2}$ Lutton 81.

Hence observe this distinction - whether a given point or subject of controversy was in issue in the former case, must appear from the record. But whether the subject is in issue in the latter suit is the same as that in the former, may be proved abundantly. As I have before 2 times noted of the same tenor & date sued upon in 2 successive actions. So make a war it must appear from the first record that the same suit, as will support the 2d suit must have supported the first. 3 Wils. 308. 2 Exch. 50.

J. Mills. 208. 2^d Edition. 20.

But in a suit for performing work unskilfully, the record of a former action in wh. I defd. had recovered of J. B. H. for performing J. same labour, was holden inadmissible, since it did not appear by J. record th. J. first action - it having been tried on J. genl. issue - yet J. unskilfulness of J. work was given in defence in J. first action - & of course it did not appear

from the Record that I point out in issue
as the distinction must be laid down requiring,
2 Johns. 24. 30. Dwight's Evid. 25.

And a similar subject, whether in some
matters of conclusion or not when the point
or matter decided by it comes out collaterally
entirely in question, as when it found
I first of I action or defence in a sub-
suit. 200. 12. Pra. 35. 0. Bull 253. 14.
200. 12. 30.

As in ejectment. - question of legitimacy
of I child. - if there is a sentence of
an ecclesiastical Ct. deciding upon the
marriage of his parents is conclusive as
to the fact of their marriage.

So in an action on a policy of Insurance
with a warranty that the ship was neutral
a sentence of a Ct. of Admiralty condemn-
ing her as an enemy's property is conclu-
sive. Bull. 244. 8th Ed. 18. 432. 2 East 268.
419. 7th Ed. 523. Pra. 78. Doug. 554.

But a judgment if no evd. in any matter
does come in question collaterally in the
former suit, it sup. - as if a husband, insti-
tute a suit vs. his wife for divorce in consequence
of adultery with C. & B. and proved mar-
riage with C. & B. and said, give it. This wd.
be no evd. in ejectment. in an. B's mar-
riage with C. might be in dispute - for
fact found as to him was introduced
collaterally for purpose of deciding the

direct question of divorce.

Suppose a witness sworn legally in-
famous in a suit between A. & B. the
judgt. wd. be no evid. of that fact in
a subseqt. suit between the same parties

or suppose in Specter. between A. & B.
A's legitimacy shd. be put in question,
or issue under 3 genl. issue - & judgt.
in that case wd. be no evid. in a sub-
seqt. case in wh. the question of A's legiti-
macy shd. arise. Bull. 223. 4. Hob. 53.

And a judgt. of a Ct. on a point only in-
cidentally cognizable by it, is no evid. in
another suit between the same parties.

Rea. 76. Inst. 12. as when a question of
criminal jurisdiction arises incidentally
in a Ct. of Ch. - as a question of con-
tra band in an action on a policy - the
judgt. is no evid. of fact in any other
case - for an action on a policy does not
directly involve a question of contraband,
that question arises incidentally in evid.

The Rule is the same as to any fact more
ly inferable by argumt. from a former
judgt. Rea. 49. 76. Inst. 12.

As a judgt. on a point is no evid. in an-
other case yet he was legally capable of
binding himself by a contract at the time
of giving a bond.

And a prior judgt. upon a finding on the
same issue is in no case conclusive - in

and a verdict itself is no evid. at all, un-
less the cause of action is the same in both
cases, even tho' the title, out of wh. a right
arises, is the same. *Rea. 37. 8.*

Thus a prior judgt. on a genl. issue for dis-
turbance or nuisance will not conclude
either party in a subseqt. action for a
repetition of the injury. The causes of the
prior & subseqt. are not the same - tho'
the right or title is. *Rea. 37. 8. 10. 11. 140.*
Bull. 232. 5 East 365.

A verdict may be evid. where the cause of ac-
tion is not the same - for it is the end of a ver-
dict to determine a particular fact - & if the
facts are the same, it evid. & sometimes con-
clusive as to that point.

But a judgt. only determines a right - it can
be evid. only as to right of action or defence
the way determined by it.

The verdict is here allowed to be given in
evid. but is not conclusive - & the reason
given is - that the opinions of 12 men are
persuasive evid. on another jury.

Quib. 2930 Bull. 232. Stra 908. 1152. 2 Met 142.
Barth. 78. 5 Mod. 386.

If a title or any fact decisive of the
right of action has been distinctly put in
issue & found - a verdict may be pleaded
in way of estoppel, in another action be-
tween the same parties. *Rea. v. 37. Rummington v. Rummington*
12.

It is important to understand the distinction between a verdict of *judgt.* & verdict on the subjects & writers are silent. -

There is an important diff. between a *judgt.* & verdict in relation to their natures - effects & effects.

A prior *judgt.* is a sentence of L. deciding a right. 3 East 346. 354.

A prior verdict is only evd. of a matter & part in a former suit - tho in many cases conclusive evd. & when it is so, it is pleaded by way of estoppel is decisive of the facts found by it - & conclusive in favour of a party pleading. 3 East 358. 60. 5. 354. 346.

A verdict is never conclusive, unless, by way of estoppel, it is specially pleaded.

A *judgt.* may be conclusive without being so pleaded & is always conclusive when available in any way or form.

The reason is this - when a verdict is given in evd. under a *judgt.* - a question is open to all relative evidence whatever & if it is pleaded by way of estoppel it excludes all other evd. - as B. pleads a *judgt.* release of all actions & the *judgt.* find it - A brings another action on contract made before the former verdict - B. may plead that verdict - & it shall be conclusive - but if he pleads a *judgt.* issue he may give it in ~~issue~~ evd. tho it is not con-

clusive - for its conclusive nature is waived
by question is it open to all relation evid.
Barnwell v. Alarson 662. 3 East 246. 1 Salk. 276.

9th "Inducement Act." by 10. vs. 75. to re-
cover back money paid 73. may show under
genl. issue - & record of a former judgt. in
wh. 3 money was paid. as if had it by way
of appeal - in either case it shall be con-
clusive.

The office of a verdict then is to ascer-
tain a matter of fact. The office of a
judgt. is to ascertain & right by & Law or
& fact. ascertained by verdict or otherwise -
since a trial judgt. when evd. at all is con-
clusive evd. in other words to it is rela-
tion to & right decided by it - & must be
so from & nature of & case - It can't be
presumptive evd. merely -

94th the Rule that the judgt. is conclusive upon
the same cause of action when evd. at all,
applies - as well when given in evd. under
& genl. issue (in some cases) as when it is
specially pleaded. Rea. 3457. 1 Day 170. 1 Lev. 235.
9th bl. 756. 761.

A verdict may in many cases be given in
evd. when it is not conclusive. This holds
only in those cases in wh. & cause of action
is not & same - & judgt. wd. be conclusive

reason in wh. 2 causes of action in 2
actions are the same - the verdict sh. be no
void at all.

And if two parcels of land are held by
same title - a verdict in a prior action as
to one may be given in void in an action
as to other, but it can't be a bar.

Bull 232. Gilb. 29. 30. 2. 5. 2. 1. 3. 1. 151.

But with regard to this case - tho. a verdict
as to one piece is ~~void~~ void, tis not conclu-
sive void - and 2 subjct. matter in both ac-
tions being same - it sh. have been conclu-
sive - as action of ejectment.

Thus again a prior verdict may be given in
void, in action for continuance of the same
nuisance - tho. 2 causes of action are not the
same - tho. 2 actions depend on one & same
right. East 305. Dec. 37. 8. "D. L. 40." 689.

The case of two successive ejectments,
for 3 same land falls within 3 same rule.
109 Mod. 1. Dec. 17. 8. 40. Gilb. 15. Bull. 232.
Carth. 78. 181. 2 Mod 142. 580. 586.

In ejectment, it is impossible from 3
numerous fictions - it can't appear 2
3 parties are 3 same or yt 2 causes of ac-
tion is 3 same - so yt 2 judgt. can't be
made an estoppel.

This sh. by Ld. 2. a verdict can never be
void, unless as to facts specially found by
them. - But this rule seems not to be L.

Ld. 2. 18.

The true Rule is, that a verdict may
can be pleaded by way of Estoppel unless
the facts are specially found, - as action
on a prior disturbance - & verdict may
be given in evd. in a subsequent action for
a continuance. Gilb. 29.30.35. Bull. 232. 3 East 365.

1 Esp. R. 43.

In genl. then a Record of a former civil
suit is no evd. in a subsequent action as to
the facts or rights determined by it - unless
as between the parties or privies to it - & not
as respects 3^d persons - as to 3^d persons
then the answer is "res inter alios
acta."

They have no right to interfere with & contradict.

As the benefit ought to be mutual - since
neither shall not operate vs. a 3^d person -
he shall not produce it in his own favour.
Gilb. 20. 3 Mod. 141. Bull. 232. 232.
Dea. 38. 64. 8. La. R. 1292. 2. Mod. 1 Dea 70.

But it is so, that this Rule does not hold
universally. There is a particular class
of cases in which it is not mutual.

Gilb. evd. 37. 5. 3. Mod. 141. Hard. 472.

Thus for one who is living in Estate may pro-
duce a verdict in his own favour - tho' if the
verdict had gone against other party - it wd. have
been no evd. as to privy - as if a tenant in
reversion, as tenant for yrs. - This verdict may
be given in evd. in a subsequent action of A.
vs. B. reversion of same land. It was done
in 1st action. Gilb. 25. 5. Dea. 38. 9.
La. R. 30. Bull. 232.

is if there are several remainders limited by
one deed - a verdict for the remainderman
is void. for another of them vs. same or
verse party. But a verdict vs. the first
remainderman is, in no void. vs. 3d.

Bull. 232. Har. 462. Bea. 39. 10th. 17.

(I don't think above exception an obvious one & don't understand it.)
verdict it seems if 3 first action was over
is tenant for life - see. contra - 10th. 17.
245. Bull. 232. Bea. 39.

But the Rule of 3d Record is no good. un-
less as between 3 parties or parties, is sub-
ject to several ^{the} exceptions founded on very obvious reasons.

Thus when one person sues for his own con-
cept & name of another as party to a suit
& verdict may be void. tho' not conclusive
for or vs. 3d former - as in 3 case of success-
ive ejectments for the same land not in 3
name of diff. lessees by one lessor. Bea. 40.

In such case 3 verdict in
3 first case is void. for or vs. 3d lessee in
another suit. Gilb. 25. Bea. 40. Bull. 232.

is a verdict vs. A. who justifies
as serv. of B. tho' not conclusive - is void.
in a subseqt. action by 3 same plaintiff vs. B.
B. justifying as serv. of A. if for a re-
tention of trespass - for in this case
line & lessee in tail is virtually tho'
not nominally 3 parties in both suits.

Bea. 40.

Group. 5th. Skinner 10th.

There is another exception when the point in dispute is a question of public right - In such case a verdict finding a public right or usage or disallowing a right will be void. In that point in a subsequence between other parties - & a verdict finding a public right of mine & right of a city to toll - & such, or a baron or any custom in gene. in an action vs. H. will be void. in an action vs. H. ~~will be void~~, in an action vs. C. turning upon the same point. Purvis v. Car. 11. 150. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235.

Thus in Tresh v. H. an action under a public right of way - a verdict vs. him may be given in crim. v. B. in a subject action of trespass vs. him when he defended in the same right & vice versa. - The case in fact contains this principle.

In no one of the above cases is the verdict conclusive, because the parties not being the same there can be no estoppel.

The principle of the last exception probably is, that as the right in question is a public one - every individual is in some degree interested in it, & might be either benefitted or injured by the first determination upon it.

The sentences of Ch. 11 above determinations are in Reyn. - as Ch. 11 of admiralty are generally conclusive crim. gen. v. all persons - whether actual parties or not - In all persons may be some part in it - & if so it is substantially such.

Reside: a sentence of condemnation acting directly on a subject, is in the nature of a conveyance or transfer of it - like an execution title. 8 T.R. 180. 4 J. 4. 2 T.R. 523. 681.

5 T.R. 255. 2 East 208. 2 D.R. 717. 1174.

Marsh. L. 288. 92. 328. 614.

Whenever ex pte matter determined by such a Ct. comes after in question incidentally in a civil case in a Ct. of C.L. a sentence is conclusive. - as question to necessary issues determined in a prize Ct. & same question after arises at C.L. in an action of & underwriters. The sentence of the former Ct. is conclusive. 5 T.R. 255. 8 D. 180. 434. 722. 523.

Note - It must come incidentally in question at C.L. if at all - as C.L. Cts. have no direct or original jurisdiction - or cognizance of such subjects, - It can never come in question directly.

The Rule it has been held is the same - & for some reason as to a sentence of a Ct. having jurisdiction of a probate of wills granting administrations &c. In these cases as in a former - a sentence granting probate &c. (In these cases as in a former) conclusive upon all persons & even in criminal prosecutions. - 1 Day 170. 2 D. 382. 1 T.R. 125. 1 Lev. 235. Rea. 78. n. 945 to Criminal prosecutions notwithstanding a rule in equity was denied. 1 T.R. 125. 1 Lev. 235. Rea. 78. n.

Thus suppose a man is in the possession of a piece of land as executor of J. J. - B. & dies

the title of 94. as such - for this case, & sen-
tence of 9. Ct. granting probate of 7 will &
setting testamentary of 7 aside.

(* infra-stro 181, 703. Amb. 701.2. Leach Ct. 7. 281.)

So too H. says of 7 Exr. of J. D. on bond &
B. denied that he was Exr. & offered to prove
7 will was forged - but was not allowed to
do so - sentence of 9 Ct. being held con-
clusive. 1 L. 235.

On indictment for forging a will - probate
of 7 will in 7 super prerogative Ct. was
held conclusive. * Tra. 618; 703. Leach Ct. 7.

But this is now denied by Ld. Ellenborough in
Rex vs. Gibson - 1802. 1 Phil. 247. as regards
crime. Prosecution - vide Leach Ct. 105, 2 Mo.
121, 421 - contra - but there 7 probate was
void - the supposed testator being alive, & so
no jurisdiction. - vide R. vs. Hall. 420. 8. 430. 6. 8
vid. 3 P. R. 125.

So also in civil the sentence or judgment of the
ecclesiastical Ct. or prerogative Ct. are con-
clusive as all persons or 7 question arising
incidentally in a Ct. of E. L. viz. in mat-
rimonial cases - as upon questions of mar-
riage, or divorce &c. Amb. 750. 62. 3. P. R. 471.
8. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 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2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2

no in an action on a note by a creditor of
his supposed wife for a debt is her while sole-
a gain sentence vs. & marriage is conclu-
sive vs. & folio Pen. 78. n. Anb. 763. 158. Stra. 900.

The reason of & note in these last cases
is because it is the sentence of a & nature
of a proceeding in rem - it cannot to con-
clude all persons - third persons neither
are nor sh. become parties to it. In a
right determination even at C. L. between 2
persons vs. necessarily in person & sentence.

But a determination at C. L. in & prevail-
ing sentence in a case C. L. suit in person
of & early to & prior suit vs. not in person
& first suit. - Thus if & parents of & sh.
are divorced in & Ecclesiastical Ct. & sh.
shd. a t. recover as heir to his baronet-
ry vs. he is respondent to & sentence of di-
vorce - but if sh. shd. recover in dissi-
sion vs. B. & C. shd. a t. recover vs. & t. t. t.
vs. he no inconsistency in the two judgments.

It is even in & same principle as when an
execution is taken under a judgment vs. sh. &
void vs. & sh. in & Ex. vs. all others -
or on sh. a deed of land from & to & sh. vs.
of title in & B. vs. 2 persons, & in & sentence
of what it conveys, it establishes an un-
mistaken.

It don't merely, like a C. L. judgment, ascertain
a right, & award its enforcement, but executes
itself.

Such sentences, notwithstanding, are not
conclusive vs. King or a public witness
as upon an indictment for bigamy.
1st. It is so, because King is not become
party to proceedings. 2d. Because
fact in question, considered as a crime
is not cognizable by Ecclesiastical Ct.
But this last reason is held equally in
case of forgery. See 78. v. 201. Ind. 17.

And in former cases individuals who are
strangers to proceedings - may show that
sentence was obtained by fraud & set
aside between parties - on any other good
reason & Ct.

That being extrinsic facts which
affect most solemn proceedings - for it
may be averred even in a collateral suit & it
is not way misled by fraud - but not that
it was mistaken. See 78. v. 202. 2d. v. 17.
And 75.

There is a judgment in a former suit
given either whole or a part of cause
of action or defence in another - & accordingly
it may be given in evidence in latter for
or vs. a stranger to the former action. -

Thus where one has been com-
pelled to pay money to another - & sued for a
reimbursement - he may give in evidence & recover
of himself - not indeed for the
purpose of fact as appear in first record
or right which in fact is established - but
for purpose of showing a simple fact, that
a recovery to such an amt. has been had.

this being a necessary part of the cause & is
invariable only in Record.

The Record is itself, in such a case
of facts which constitute a cause of action,
as where a surety has been compelled to
pay for his principal - or a ship for the
agent of his master, - a master for the
injury done by his servant. - or an indorser
for the acceptor of a bill, - In each of
these cases if an action is not to recover
an indemnity as principal or wrong doer,
the prior recovery may & must be proved
as a Record in the first suit. - for in these
& similar cases - the prior suit & its conse-
quences constitute a ground of recovery
in the latter case. Rex. 28. 8. 14.

So also in an action of tort of warranty,
the ship may give in evidence & record of the
suit by which he was evicted for the purpose
of showing a quest of his eviction - but not
that the title was in evictor - unless the cov-
enantor vouched in - & if the covenantor was
vouched in, in the prior suit, the record is con-
clusive in the whole case. "Court. Broken"

Quib. 28. Bull. 22. Roll. 370. Rex. 37. 14. 17.

And in an action on tort of warranty of
title to a chattel - as a horse - the ship may
for the purpose of proving that he has lost the
title, give in evidence a recovery as himself
is a stranger for the same chattel but not
for the purpose of proving that the title was in

the stranger. *Quins. § 7. Sect. 18.*

State - in the cases cited & cited
have notice of a prior suit & Sept. that
the might appear & depend & title.

But here was notice necessary for reaching
in it used only in real property.

For former satisfaction & trained by, & title
in a stranger - for & thing or matter in
demand had been carried - i.e. former recovery
of J. D. for the same thing, for
in & one case & former recovery constitutes a
suit, & in & other & whole of the defence.

Quins. § 78. - as if J. D. & B. jointly committed
a tort to John Doe, now if J. D. sues and
recovers vs. B. & sues of me, & had the
former judgment in bar.

In cases also in which a party to a suit
takes his title from a judgment in a former
suit between himself & stranger - he may
give a prior record in evidence. The record in
question either party claims an execution
title under a judgment of his own vs. J. D. or
another judgment in evidence for & record of a
suit & & depending upon and in
nature of a common assurance. *Quins. § 4.*
and are also admissible upon & same principle
as in which a deed from J. D. vs. B.

These notwithstanding are
not evidence of title vs. J. D. but only of the
fact of whatever title or ownership in him,
if now in & party who records judgment vs. him
in record & deed from him.

⁶ Whether the verdict in a criminal case can be used as evd. of guilt found to be it in a subsequent civil suit is so. to be a point not clearly settled. Dec. 41. 84. 8. 9. Bull. 225.

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There has been indeed some contrariety of opinion upon the subject - but according to the general principle of L. & C. and. & I would of authority, it seems not to be admissible.

July: 27th. Walk. 41. 140. 8. 283. Avg. 2.0.
 Tra. 311. 1 dia. 225. 7 hills 30.2. Tra. 41.8.

4 Burr. 225. 1 East 577. 81. 1 Campb. 6. 7. 151. 1 Phil 87. 8.

The well settled Rule of admitting, & not
excluding by a public officer - unless
the single case of grocery - to testify
as to offender upon a criminal prosecu-
tion for same offence - seems decisive
that a verdict is not evd. in a subse-
q. civil suit. As it were in Ct. not
testify - Post pag. 10.

But 3 Record in a prior civil or criminal case is not in a subsequent case as a part of the res gestae - to show that such a course of action was tried or existed - tho 3 suit or prosecution was in diff. Dept. - as on an indictment for forgery - 3 Record of 3 prior case in wh. 3 forgery is charged to have been committed 3 end. for that purpose. Bull. 242. 3. Bea. 48.

g^o in an action for "malicious prosecution"
 & holds that former prosecution is end of the
 former prosecution. *ib. auct.*

7th verdict notwithstanding, withel. judgt. in
a corner suit is in no case void. & facts
found by it, till final judgt. has been render-
ed upon it, go till that if done it can't as-
sail whether a verdict stands or not.

Rea. 49.50. & tra. 161. Bull. 240. Phil. 292.

The verdict notwithstanding, & not a judgt.
admission, & only proof of a fact found by it.
The judgt. is necessary only to render a ver-
dict admissible.

8th But this Rule don't apply when a purpose
is made. & record is offered in evd. if meant to
prove a fact that such a former trial has
been had - In these cases the verdict in a
former suit is alone sufft. as in & above
all of course - so in cases of this kind,
the immaterial whether a prior verdict is
established or set aside - it not being of
force as evd. of facts proved by it.

Rea. 50. Bull. 245.

9th And a verdict upon an issue out of a trial,
with a decree in pursuance of it - is evd.
as a decree is in a purpose of establish-
ing a verdict - equivalent to a judgt. at
L. Rea. 50. Bull. 254. Phil. 292.

10th To third, when Records & when not, when
available in copy of Record - & when only in
index - vide Title 38.40. Bull. 257. Rea. 50.

Acts & proceedings of Congress & Records
of the Ct. of the U.S. are bound as our own Acts
& Records are - Constitution & Laws of the U.S.
being binding upon each State - as part
of its law. *Sup. Ct. 5.7.*

Under the Constitution of the U.S. as con-
strued by our Ct. - judges of the in the
neighboring States are of some solemnity
as our own - i.e. conclusive. *Sup. Ct. 2 Dall.*
342. Constr. U.S. art. 4.

9th neighboring States & opinions have
been contradictory. *2 Dall. 302. 2 Mass. 304.*
Trained 400. 1 Johns. 420. 1 Dall. 188. 2. 214.
201. 5. 1 Johns. 23. 8 Johns. 86. 175.

But now in 7th. 2. 3 Rule is pretty much
the same as ours. *8 Johns. 179. 86.* The
Rule established here is now adopted by
Sup. Ct. of the U.S. - see Dec. 7th 7th branch
481. 3 Wheaton 234. Constr. U.S. art. 4. sec.

As to the mode of proving the Legisla-
tive acts & Judicial proceedings of our
neighboring States. see *stat. Court.*
457. Sup. Ct. 6.7. stat. U.S. vol. 7, page 151. ante.

no objection is no cond. & answer in a sub-
sist. suit. Dea. 54, Earth. 99, Bull. 237,
2 Kent. 90. 2 W. 239.

It is answer of a trustee void as the
custody was trust. Bull. 237.

A confession as such is only void, & can-
not make it - & how far a woman may
be prejudiced by an answer made as her-
self while void, is not fully settled.
Dea. 54, 2 W. 239, 225, 35.

But an answer by one of two partners in a suit
vs. him by &c. - is void, as him & other part-
ner - even in a suit vs. him by B. Dea. 55.
20. cap. 16. 209. Doug. 629. Chit. 209. ante 24.

So a voluntary affidavit by one jointly in-
terested with another has been admitted in
one action as then both - Dea. 55, 6 Gillb. 51. 6. 7.
It being a confession of a party to a action &
in interest - This notwithstanding, is not
strictly of a public nature - for a affid-
avit is extrajudicial. Gillb. 56. 8. 2 Kern. 94.
288. Kern. 53. 313. 2d. Dea. 311.

But in genl. a copy of the whole answer &
not of any particular part only must be
exhibited - as in a case of judgments & indeed of
all written instruments & confessions. Dea. 55. 51. 6
5. 1109. 11. Bull. 227. 51. 2 Kent. 94. 288. Gillb. 50.

And the party who made an answer is entitled
to make a second answer, but in no case except
in a writ of explanation &c. Dea. 55. 51. 6.

145. A party whose answer is produced in evidence in a subsequent suit is excluded by a admission contained in it w. himself - so on the other hand a verdict in it made in his own favour are evidence for himself. The opposite is not concluded by a latter - but is not likely to contradict them by other evidence, or to insist from circumstances or presumptions that they are not entitled to credit. Rea. 55. 6. 7.

Gill. 50. 2 Kent. 194. 288.

In one instance part of a answer may be read as evidence viz. to show that one offered as a witness is interested in a suit to a suit - then the very attempt to exclude him w. introduce his testimony as given in a answer. Rea. 57. Bull. 288.

The affidavit of one of a party who has been used in a case is of a nature similar to that of an answer - & probably in the same way. Viz. by copy. Rea. 57.

But a voluntary affidavit being of a private nature can be thus proved - the original must be produced as in the case of other private writings - as deeds must be proved to have been sworn to - i.e. affidavit by record that an estate sold is not incumbered. Rea. 57. 8. Gill. 55. 6. 7. 7 Kent. 58. 415. Ld. 22d. 311. 234. 343. 450.

If a man make a voluntary affidavit - perjury is not punishable w. it - it not having the sanction of an oath.

Depositions used in a former suit are al-
so used. between & same parties on a subse-
q^t. trial - if the deponent is dead or not to be
found - & cases they are not in force, &
misleading - not being of best evd.

Dea. 58.9. Gills Co. Lach. 278. 6528 16.4. 1808.
180. Bull. 289. 1911. 9. 14. 283. 5. 7. 1808.

They have been so, notwithstanding, in
admissible when the deponent, being unwell,
and unable to go on his way to Ct.

Gills Co. 1911. 283. 7. 1808. Dea. 58.9. Bull.
289. 1808. Dea. whether this is one
thing more than a ground for postponing
trial. Dea. 58.9.

But the deposition of a witness like any other
in a verbal declaration of his may in all cases
be introduced to contradict his testimony.

The deposition, notwithstanding, is not used as ev-
d. in chief - i.e. of facts stated in it - but to
invalidate & testimony of & witness. Dea. 58.9.

I. 4. Whether & deposition of a witness who at
time was disinterested - but who after ex-
amination of L. becomes interested - & a party can
be used in evd. & opinions are not agreed -
i.e. of becoming heir or exor. or admr. to &
party to & original suit. The better opin-
ion is in favour of admitting it.

Dea. 58.9. 1808. Bull. 280. 1808. 708.
2 Kent. 677. 2 Ves. 442. 2 Atk. 261. 5. 1808.

Depositions to impeach testimony or to be
used in a trial under the direction of the
court for that purpose - when the witness

resides abroad or is about leaving country or
in apparent danger of death. In the
last cases, & depositions are not void, till
a contemplated event has occurred. Dea. 66. 1 Bull. 240.
3 P. Wms. 303. Tulk. 571. Telf. 1148. Post. Hard 318.
3 Blk. 373 King Chy. 382.

In Cont. & Telf. &c. as in 17. & 49. are
empowered to take depositions on oath & upon
a bill for that purpose. The usual notice is
given to the adverse party & a deposition is ta-
ken by a commissioner appointed for that pur-
pose by the Ct. - Stat. Cont. 237. Telf. 115.

Sworn Depositions like Verdicts are only void
as between the parties in a prior suit in which they
are taken & their priority. Dea. 64. Bull. 23.
Gill. 51. 19th. 443. 3 Do. 415 501. 2. 524.

To introduce one interlocutory proceeding
in a Ct. of 214. in void. bond of a prior
stage of a suit is necessary - thus to make
an answer admissible - & title must regularly
be proved - & so to subsequent proceedings - for
it can't otherwise appear that an answer was
made in a regular course of judicial pro-
ceedings. Gill. 35. 6. Dea. 66.

But if the will has been lost or destroyed -
it may be proved like all other documents
in such cases, by parol or secondary evd.

Dea. 67. 22. 5 Mod. 211. Gill. 42. Bull. 233. 228.
1 Kent. 277. 2 Kel. 31.

A Decree in Chy. is void. whenever a judgment, at L.
was or so, & a Decree in Chy. & a judgment in a
Ct. of L. are the same, or diff. terms to express the same thing.

Dec. 30. 04. of 16. 29. 2. 00. 222.

The provisions in § 11 of Admiralty, in Eng.
in discretionary cts. are evd. of same na-
ture of authority as those of Eng. - This
rule was not applied to have no jurisdiction
of a subject-matter - as in private of a dis-
sentence in a matrimonial cause - a case of King
vs. King, 11 Mod. 231, 2 W. & A. 258
3 W. & A. 259, 12 W. & A. 258.

In these cases I suspect, as Secre is conside-
rable in a lot, & L. - that it is allowed to show
a seal to, & tot. or rather, proceedings are pointed
for this about control the sentence - but, not
that none exists: Lea. (p. 1) vol. 359, May 9. 1805.

These proceedings are movable in every other public writings are. With N. A. Smith.
St. Louis, 1772. ante 24.

As to the founding of inferior towns in Eng-
land & Wales - their mode of growth, which
I have from Dec. 6. 1836. A. 830.

The quintessence of a conclusion is not a conclusion. Here the conclusion is not a conclusion of fact but it is important to establish - not fact at all, indeed not fact - Dec. 10.

Letter No. 10 to the Hon. Secy. of Foreign Municipalities

this distinction is to be observed - 977, party claiming & receipt of judgment apply to court to enforce it but prima facie evid. of his claim - In as he voluntarily submits it to jurisdiction & decree of a Ct. here, it will examine & merits by enquiring what is foreign L. is - & whether judgment is warranted in it - But such judgment when used in way of defense to an action here is conclusive, as a judgment of our own. Dea. 70. & H. 56. 210. Doug. 11.

*A foreign municipal Ct. is one established by local laws of a State. Such a judgment may be proved -

1. By an exhibition under the national seal, - & seal of one nation being submitted to be known to & Ct. of another. 9 Mod. 66. 114th. 85. 115th. 87. Dea. 78. n. 3. 2 East 22. 85.

2. By a sworn copy. 2 Branch 187. 5 East 473. 1 Phil. 20. 301. n. "Plays" 63. ante 26.

3. By a attestation of a proper officer to a Ct. But in this & seal must be proved as any other matter of fact - so & seal of a foreign municipal Ct. is not supposed to be known here - as is that of a public L.

Dea. 72. 3. 5 East. 321. 114th. 87. 115th. 87. 1 Phil. 20.

Foreign Ls. - decrees &c. may be proved by copies under a national seal - or by sworn copies - 2 Branch. 187. 5 East 473.

By & seal of consuls - & municipal Ls. of the several states of & relation - Transmitted by their exec. or Legislature - to & Gov. of State - & certified by him in & office of & Secy. of State - & exemplified by & latter's seal - are admissible in evd.

Unwritten foreign laws & customs are
proved by com. & oral evd. - but 3 testi-
mony of respectable intelligent persons of
foreign countries is proper evd. Pra. 73. n.
1 Johns. 385. 4. P. 494. Sept. 7. 34. 38.

The unwritten local laws of 3 sister States are
often certified with the aid of profession-
al gentlemen of 3 neighboring States.

Qu. Is any evd. proper out of that of
inferior men on this subject.

The sentences & proceedings of foreign
of Admiralty upon subjects within their
jurisdiction are conclusive of 3 facts
& facts wh. they import to establish on
as these facts decide of 3 L. of Nations - wh.
is a part of 3 L. of every civilized State.
their judgments are not regarded as sentences
of foreign Lts.

Pra. 70. 18. 8 J. R. 182. 232. Sept. 78.

and if they state 3 evd. or ev. they find a
fact, no L. more can enquire whether it
evd. was suff. to warrant 3 finding.

on this case notwithstanding 3 adjudica-
tion is evd. only of 3 fact. It was of con-
clusion - as that 3 evd. was an admission
- not of 3 particular facts stated in
evd. - The latter appears in substance
by way of Recital. Pack. 71. Pra. 71. a.
383.

If such a L. says a sentence or make an
adjudication with, assigning any cause for

conclusive i.e. no condemnation of a ship
on being spoken to on her voyage by an en-
emy - as lastful, bride - that she was not
neutral. - Dec. 71. Park. 413. 353. i.e. Park. Ind.

But if it appear & con-
facts & conclusion founded on them, that
condemnation was not for any breach of
L. of Nations - but for a non-com-
pliance with some arbitrary municipal
regulation of a foreign State; such a
is void & of course no void, at all. i.e. con-
demnation, because spoken to or visited on
her voyage by an enemy. Dec. 71. 2.

Park. 415. 7 P.R. 532. 8 do. 434. 562.

And no Admiralty has any effect by way
or decree - in a Ct. wh. rendered it was regu-
larly established by L. of Nations.

Dec. 72. 8 P.R. 208. East. 473. i.e. French
Consular Cts. established by Bonaparte in
Spain - Portugal, not recognized by the
L. of Nations - nor by States.

Proceedings in Cts. of Admiralty are now-
able by coincis under seal & Ct. - This
seal proves itself - as as Ct. acts under
L. of Nations - all Cts. are supposed to
know & seal. - Dec. 72. 3.

The public seals of one country prove them-
selves. - Private seals do not. - as the
seals of individuals - of corporations - of
countries - Towns &c. 1 Exp. R. 53. Dec. 73. 4.

Gill. 20.

To v. a seal of a foreign not-
ary - public - this officer being established
by public L. his seal & attestation are

the usual medium thro. wh. the facts were
gived by oath or by certificate sometimes
specially by affidavit are proved - in
all principal tribunals. Pra. 74. n.

10. R. S. 10. Mod. 11. 2d. 12. 13. 14.

"With Exceptions".

An award upon a submission to ar-
bitration is as conclusive as a judgment.
It is established by L. Pra. 75.

An award is in the nature of a judgment.

And altho an arbitrator can't exactly trans-
fer real estate by his award - yet he can
order it to be done - & his determination,
upon a point of title will be conclusive
in effect. Pra. 76. & East 5. note 4.

A verdict by a ship-capt. is not evi-
dence in chief of facts it states in an action
on a bill of lading. - But it may be used for the
purpose of contradicting testimony of a
person who made it. 2 Esp. 170. 690. 10th 120.
Long. 910. Marsh. 510. 2d. 1000 R. 51.

True copies of regular entries in the books
of executive officers of Govt. are admissible
evid. - Ex. of entries in the books of the
Treasurer or Comptroller of a State or U. S.
are not office copies also? 25th 228.

The same rule holds as to notes of
proceedings in corporations entered in the
books. - Ex. of Banks - Insurance Com-
mission - &c. 25th 228. 2d. 1000. 1st. 115. 2d. 90.
1st. 93. Doug. 593. 7th. 13. 50. 2d. 90.

But where a document is in its nature private, the belonging to a public body, the original must regularly be produced - as a letter belonging to a corporation.

Dec. 90. 1. 1 Tra. 401.

But the declarations of an individual witness are no evid. for or ag. a corporation - for corporations act & speak only by their organs.
Sept. 23.

94 Gazette - published under the sanction & control of Govt. is suff. evid. of an act of the State. Dec. 77. 8. Sept. 23. 5 Dec. 9. 10.

Bull. 226. 2. No. 4 Bull. 477. - as of emigration - blockade - regulations of trade - Decr. of War. - &c. &c. proclamations of Govt. - & addresses of Govt. to the Executive or Legislature. Dec. 77. 5 Dec. 9. 10. Bull. 226.

The Register of the Navy Office is evid. of a ^{death} seaman. Dec. 79. Sept. 23. 2 Dec. 9. 775.

The books of a public prison are evid. to show time of a prisoner's discharge.

Dec. 77. 5 Dec. 9. 188.

Govt. Log-book of a Man-of-War, to show time of sailing with convoy - or other facts of that nature. Dec. 77. 5 Dec. 9. 188.

A Genl. Hist. it seems is evid. of such past events & facts of a public nature as admit of no other proof. But it is no evid. in matters of private concern - as of a particular custom. Dec. 77. 83 Bull. 287. 12. 110. 89. 119. 120. Bull. 287. Sept. 23.

Deeds & conveyances when of & authentic
of Government, are void, when individuals
not named in them - as *Boomer v. Fish*
in *Cal.* - *Surveyors v. State* 81.

Cal. 81. 400. 188. 716. 78. 170.
Cal. 188. 81. 114. 70. 101. 24.

Such public acts being entitled to a high
degree of credit - Hence if private inqui-
sitions - as one taken by a *Shp.* to ascer-
tain & ownership of goods seized in *Gen.*

This is no *Qrd.* in an action not vs. him
or a 3^d person claiming goods.

Shp. v. Cal. *Cal. 85. 114. 115. 431. 114. 88.*

In *Eng.* parish registers & sworn copy
of them are evd. of birth - marriages &
deaths. - *Cal. 86. 114. 21. 114. 16. 73.*

In *Cal.* Town registers or rather copies of
them are evd. of births & marriages - &
a certificate from a clergyman or magis-
trate is evd. of marriage.

Ancient maps those made with public
authority are evd. when they have accom-
panied & possession & use with & bound ar-
ranging *Quinta* in recent surveys.

114. Cal. 74. 114. 85. 114. 11. 18.

The Records or Proceedings of *Clk.* of Justice
are open to the inspection of all persons in-
terested in them. *Cal. 112. 114. 247. 114. 12.*

Public & books of public office are also
demandable by all persons interested, unless

public books require their contents to be kept
secret. Ex. of a treatise. Sta. 304. 2 J.R. 515.

And if an inspection of such books is re-
quested when applied for by a party to a
suit no new occasion to examine them is
created. A Rule grant him inspection as
far as relates to the point in dispute & order
of officer refusing - to permit an inspection
so far as relates to the point he is & Sta. 1007. 1225.
1242. Rev. 92.

The Books & Papers of a Corporation are
also open to be inspected by all its mem-
bers - & in a suit between 2 individual
corporations or between a corp^o & one of its
members - an inspection may be ordered
by a Rule of J. Ct. 2 Ves. 511. 3 Wils. 398. H. R.
211. & J.R. 390. 300. 301. 379. 170. 559.

But this can't now be done in
not of law in favour of a stranger - even
in a suit between himself & a corpora-
tion - tho in some few instances it has
been done.

A Rule to furnish in such a case does com-
pel a party to furnish evid. of himself
but the other party has no title.

A J. Ct. of Eq. notwithstanding upon
a bill for discovery, may in its discretion
order an inspection of Corporation books
in favour of a stranger - it being then
in its service that J. Ct. to compel dis-
covery. - 5 J.R. 302. 3. 2 Ves. 521.

This is (to compel) upon a same principle
of compelling an individual to make
oath discovery under oath.

But in criminal prosecutions is a corporation
or any of its members - no let. of justice
will or can order an inspection of the books
of a corporation. 1 Wils. 235. 1 Bl. 57. Pra. 94.5.

"I am not a corporate tender" - 2 Stra. 1210.

This Rule does not apply to an informa-
tion in a nature of que waranto - the crim-
inal in form - for it is in effect a civil
proceeding. - Hence if it is prosecuted
by a member of a Corporation - an in-
spection of a Corporation's books may be
ordered. - 5 D.R. 374. Pra. 95.

Private Writings.

When a fact is to be proved, or other private
instrument is original if in existence & in the
power of a party in whom a fact is to be pro-
ved, must regularly be produced. -

ante 49.8. it

being a best evid. not movable in obj.

And if that is not done, no
evid. can be read of its contents of the in-
strument. - 1 Dalr. 209. 5 D.R. 403. 15 Geo. 92.3. with evid. 92.3.
Pra. 95.7. & 100. 12.

The counterpart of a deed notwithstanding
can be read in evid. vs. a party to whom it
was executed & delivered tho' not vs. the
other party or a stranger. - "Add 7.
& 100. 12. 14. - in evid.

That is; original instrument, if it is in the hands of a person who is not a party to it, or even such evidence, if its contents may be established. This being the best evidence. The case admits of it. - 2 D.R. 151. 1840. 526. 4 East 585. 1 Campbells. "Plays." 104. ante 87. 89.

If instrument is in hands of adverse party & he has had due notice to produce it, secondary evidence may be given as above - if it is first proved that original was a genuine instrument. - 1 Atk. 441. Phil. 12. 2 Den. 57. 107. 2 D.R. 201.

1 Mc. Hall. 346. 2 D. & Bull. 59. 237. Chit. 206. 210. 1 Esp. R. 50. 2 D.R. 157.

Note - 3 Rule is the same in criminal cases.

Leach. 278. 2 D.R. 201. Mc. Hall. 540.

To stop a letter. After if no notice had been given - But if fact & a previous written notice may be proved without a subsequent notice to produce original.

Notice to 3 416. If 3 party is as effectual as notice to 3 party himself. 2 D.R. 205. n. 3 D. 506. 10 Phil. 12.

If original is in hands of a D. but he has been served with a "subpoena duces tecum" - & if after service he delivers it to 3 adverse party, secondary evidence may be introduced. - 2 East 511. 2 D. 97. 1840. 526.

If there is a subscribing witness to 3 instrument, offered in evidence. He must regularly be called to prove the execution of it, if alive & in a situation to be examined.

This being the best evidence of 3 fact. ante 7.

2 D. 97. 4 Esp. R. 239. 5 D. 10.

This Rule holds as well when the instrument
is offered to prove a collateral point - as when
it forms the ground of action or defence,
4 Esp. 287. 10 Mod. 28.

But if there are sev. attesting witnesses,
& execution may be proved by either of them
since it is settled that even
a confession of the party to whom the in-
strument is offered is not sufficient without dis-
cussing the necessity of producing & subscribing
witnesses. - 7 Mod. 256. 10 Mod. 215, 264. Day 215. 18 Mod. 17.
2 Esp. 277. 10 Mod. 208. 7 Mod. 267. 4 Esp. 239. (contra. 2 Johns. 151.)

But it has been ruled since in
Court. 8 Q. B. 770. 10 Mod. 28.

The Eng. Rule is adhered to in the Am. Courts -
even tho' the original instrmt. is lost. - 10
Mod. 256. 10 Mod. 215, 264. 4 Esp. 239.

In such case a copy of the instrument is not
admissible, unless the non-production of the sub-
scribing witness is accounted for - as by
death or absence. - 10 Mod. 256. 10 Mod. 215, 264. 4 Esp. 239.
2 B. & C. 87. 5 Esp. 277. 10 Mod. 215.

And in England the confession of the party is
not admissible unless a sufficient reason is shown for not
producing & subscribing witnesses. 10 Mod. 256.

But when a deft. has produced a deed before
commissioners to a bankrupt - & admitted
execution of it in his deposition - it was held
in 1811 in favour of the deft. with producing
& subscribing witnesses - altho it was in the na-
ture of a judicial confession.

So where a party binding a suit consents & agrees to admit & execute in a deed in trial.

- ib. ante.
- principle same as in former case.

If there is no subscribing witness, inferior evid. is suff. as proof of & contents of & date. - 1 Liv. 25. 3 Esp. 10. n. Com. Dig. tit. test. 1. 4.

So if a person whose name is subscribed as a witness denies that he saw & executed after his denial proof may be made as if & deed did not purport to be witnessed. He need not see & execute - suff. if the party at & time confessed.

So where & instrument was not duly attested - inferior evid. may be admitted - thus a name is subscribed - as that of an attesting witness. If it appears that a fictitious name has been subscribed, as if & a witness by a party executing.

Dea. 98. 7. cas. 25. 3 Esp. 10. Phil. 303. provable as a deed not attested.

And so if & witness is interested at execution & continues at & time of trial. -

Recognition of signature & seal in confession is suff. for subscribing witness. 2 B. & P. 217. Dea. 98. n.

ix. If attesting witness had at time of attesting given collateral security to & obligee - or was & wife of one of & parties.

- 1 P. W. 284. Phil. 303. 3 B. & P. 371. Cas. 2. 147. 2 East. 182. 5.
Dea. 77. 157. 158.

So where 7 person whose name appears as
a witness subscribed with 7 consent or
involuntarily to 7 parties. - 5 Campb. 232. 4 Taunt. 220.
Phil. 563.

Note - in this & in
7 former case 7 instt. is as if it did, but
not to be attested Dea. R. 147.

So if after making nothing can be
heard of 7 witness, so yt 7 party can
neither produce him or his hand writing.
- 5 Binn. 192. 1 Phil. 307.

So if at 7 time 7 attestation he was leg-
ally infamous, Phil. 314, 554. In all these
cases 7 instt. is as if it did not import
to be attested - 7 may be proved like
any other unattested instrument. R. 147. Phil. 302.

Ex. By proving the handwriting of 7
party, or by proving his admission yt
he executed it - or by testimony of any
person present at 7 Ex. - com. B. vid. B. 2.
Dea. R. 147. Phil. 567. East. 71. 5 Rep. 2. 50?

And proof of the party's hand-
writing is sufficient ground for presuming 7 stat-
ing 7 delivering. - Dea. R. 145. Phil. 567. 1 Ed. 2. 474.

But if 7 instt. was duly attested, &
7 witness cannot be examined - his hand-
writing is the best evid.

Ex. If 7 subscribing witness becomes in-
terested after execution of act of L. or party
on whom 7 proof lies - proof of the hand-
writing of 7 witness is suff. - 2 East. 185. 1 B. & M. 289.
Dea. 57. Dea. 187. 8. 185. Phil. 562. 5 B. R. 571. 2.

In this case I incline to not consider as
unattested. Post, 1st Phil. 302. Ex. as in
the law become an Ex. in return to the
santa. Post, 1st Phil. 302. - 2 Tim. 279. Stra. 279.
1st Phil. 289. Sept 7. 12 Nov. 1807. Dec. 100. 13. 8. 300.
7th R. 255. 1 John. 230. 1 John. cap. 230.

So if I subscribing witness is dead - or
presumed to be so. - 12 Nov. 1807. Phil. 302. 300.
So when he has become blind. 12d. Nov. 337.
5 Nov. 10. Phil. 302.
Or insane. Sept. 20. 9 Feb. 1811.

So when he has become legally in-
sane. 2 Stra. 835. 5 Sep. 10. m. 275. 288.
Phil. 302.

Ex. Where he has been convicted of Treason.
felony - or "crime capital" or burglary &c.
gerst &c. - since I attestation of a
crime when its nature impeaches his in-
tegrity - as conspiracy. 12 Nov. 1807. 13.
2nd. 18. 1st. Phil. 200. 57. 405.

So if he is abroad out of jurisdiction
of J. Ct. whether committed or not. -
Phil. 302. - 2 Sept. 250. 2 Sept. 250. 12 Nov. 1807. Dec. 1. 279.
1 Sep. 1811. 7 J. R. 266.

So if after diligent search a known
witness can't be found - the not bound
to be abroad. 20 Nov. 1807. 2 Feb. 1811.
Phil. 302. 7 J. R. 255. - 12 Nov. 1807. 13. 305.
12 Nov. 1807. 13. 305. 11 John. 54. - It is sufficient search
if made in the town &c.

In all the above cases when the subscribing witness
is not in a situation to be examined - Proof of
his handwriting is considered as the next best evidence. Phil. 302.

And if there are sev. attesting witness,
none of whom are in a situation to be ex-
amined - proof of handwriting of either
one is sufft. Phil. 169. 204.

And this has been held sufft. with proof
of party's handwriting. Ken. 49. 100. It
has been usual to prove & latter also.

The weight of authority, not-
withstanding seems to be that proof of the
party's handwriting is not necessary.

Phil. 66. Ken. 101. n. & East 183. 250. & Johns. 46.
Dev. & Phil. 502. - Phil. 353.

that in party's handwriting see 75 R. 206. n. & 3 Thimney 192. & Heyward 27.
Day 255. & 20. 187.

For in these cases when a witness is not in
a situation to be examined by reason
of some supervenient cause - & instt. is
not as in prior cases consist as matters
of fact - And proof of handwriting in these
cases is evid. of every thing appearing upon
a piece of paper - as Sealings - Deliveries.
Phil. 303. 1 Comb. 378.

In Court. the practice is - to prove in
preceding cases handwriting of the party
when a L. does not require subscribing
witnesses - that alone is sufft. tho' it is
in advisable to prove handwriting of the
subscribing witness also. Lupt. 27.8.

When there are sev. obligors - & action is vs. one
only - there being no attesting witness, the
obligors have been allowed to prove & ex n.
Phil. 264. n. & 114. 55.

When in any of the foregoing cases a second-
ary evid. is to be sufft. - the meaning of

the proposition is merely that such evd. is apt
to let in γ instrument. as evd. to γ just - or
in other words to render γ inst. as evd.

If there are two subscribing witnesses & when
only one is in a condition to be examined -
& other must regularly be produced in
examination can't be dispensed with in
proof of γ former's handwriting. Pra. 100.2.

What if both are in a condition in wh. they
can't be examined - as if one is dead & the
other abroad, - in & among instance &c. - proof
of γ handwriting if one is by γ Eng. Rule
sufft. - Mc. Call. 310. D. & P. 300. Dist. 25.

Proof is sometimes made, in both
standing, of γ handwriting of both.
but it is safer to have all, & safer to have γ (I said 250,
party's too. - 103. & P. 360. 19 Mc. Call. 310.

In all the preceding cases when there is
a subscribing witness who can't be exam-
ined - if γ inst. purports to have been
made & delivered - & is strong evd. on
 γ facts to presume, yet these & γ necess. in-
matities were complied with - as Deliv. &c.
- Pra. 99. (same Gib. 100. - Bull. 194 not correct L.G.)

In proving Deeds - to γ validity in ch. 3
subscribing witnesses are necess. in Stat. if
any one of them is in a condition to be ex-
amined he shd. be produced. - & this, with
a dis. rendered with γ proving γ handwriting
of any, or either or all of them, Dist. 101. 4.
3. 372. 3. Com. R. 531. 2 Pra. 1109.

If they are all dead it is necessary to move
the handwriting. i.e. & handwriting of all
of them - & of & testator. - 108 Bull. 265.

And in such cases unless there is strong cir-
cumstances to the contrary - a compliance with
all & requisites of & Stat. will be presumed
to be. - 10.

And although all & witnesses are living, yet
one will be sufficient if he testifies to all
& requisites. unless & devise is disputed
(i.e. contested by contrary evidence & such as
in the case all & witnesses in a condition
to be examined must be produced. -

1 R. 718. 741. 1 Bl. R. 565. 4 Burr. 2224. Bull. 264.

Note See Bull. 240. & in
this case it is & duty of & heir at L. to call
& others - See Dec. - for if so - & will it-
self as a negative. Dec. 8. 372. cont.

But the will never decree a devise
proved unless all & witnesses capable
of being examined & testifying are examined
even if one is beyond sea - such
probate being conclusive upon all par-
ties. - Dec. 80. 718. 1 Mills. 216. 1 Ves. 477.

Like probate of will of testator, & such
is a prerogative of the Court. - ante 56.

Cont. & if probate will de-
clare a devise proved upon & evidence of one
of & witnesses. To wit, "Devise" 90.

can be made up in all cases to a devise of the Court.

And to any & all & attesting witnesses
of & executors to a Devise & it may

as proved in other witnesses. 33. R. 505.
Bull. 264. 2 Tra. 1000. 7 Bur. 1225.

When a subscribing witness to a deed
can't be had - other secondary evidence of
his handwriting may be adduced.

Ex. The confession of a party is an
answer in Chy. ante 81 -

When a deed offered in Evd. way, ex-
cuted under a power of Atty. - a power
must also be produced & proved like
any other deed. 1 Esp. 30. 10th. 28. -

1 Esp. R. 279. Linder L. 3. Linder 8 Linder 262.

In proving a handwriting a belief of
witness of Evd. both in civil & crim-
inal cases. - 1 Burr. 642. R. 102.

But this belief must be form-
ed on a familiar acquaintance with
a handwriting of a party - as having seen
him write - or recd. letters from him
in a course of correspondence.

Having barely seen signature but -
noting to be his is not sufft. 1 Bl. R. 384.

1 B. & P. 384. - 4 Esp. 273. d. 1 Burr. 642.

R. Appdx. 1112. Bull. 235. 6. R. 102. 4.

Having seen a party write his name
binding suit, in a book to showing
his mode of signing, is not sufft. to
let in such evd. altho evd. d. be
making for himself. - Mc. Kally 421.

- 1 Esp. R. 14th Chit. R. 207. 4 Esp. 273. e. n.

The witness said, speak solely from
appearance of & writing withl. consider-
ing extrinsic circumstances - as his ob-
servation as to & party's signing such a writ-
ing - or its ^{substantive} & his doing it.
- Pea. R. 142. Pea. vid. 102.3.

Evid. that other writings ~~are~~ attested
to by same witness were forged in this
case being dead - is not admissible to
contravert & presumption arising from prop-
erly hand-writing. Pea. 103. 2. 125.

Not evid. of his genl. character in general.

Comparison of hands is regularly not evid.
either in civil or criminal cases. 2 W. & A. 357. 4 Bl. 338.
1 Burr. 644. Bull. 236. 4 T. R. 497. Mc. Hall. 394. 417.

By comparison is meant comparison by
a jury between & writing in question &
one wh. is proved or admitted to be the
writer's & a similar comparison by
a witness who is to testify his opinion
from & similitude of & two. - 4 Esp. 273. a. c.
Pea. 114.

The meaning of & Rule is this - An opinion
formed from such comparison by a wit-
ness is not evid. & it is here have no
right to judge from such a comparison
made by themselves.

The above Genl. Rule is now estab-
lished & holds in civil & criminal cases,
Pea. op. 742. 5 Esp. 44. 273. b. Mc. Hall. 17. Pea. 102. 2. 125.
L. M. S. 118. 418. 518. 12. 110. 72. La. 10. 20. 24. 8. 10. 11.

Tho it was formerly supposed not to ex-
tend to civil cases, 11th. 53. Me. 11. 371.
1 Esp. 281. Bull. 231. Week 117.5.

Note - But may not a witness skilled in
such matters testify his opinion from
similitude of hands &c.

This is done in Ct.

In Cort. comparison of hands has
ever been allowed - 10. 10.
1 Esp. 281. Root 107.
But this is now L. now - see 11th. 53. 312.

And in Eng. where the antiquity of a writ-
ing renders personal knowledge of a per-
son's hand-writing impossible - a witness
who had made himself acquainted with
the character of that person has been al-
lowed to testify, similitude. - But this
was from necessity of the case. - Bull. 235. See 104.
1 Esp. 282. n.a. 14 20. 328. contra. 11th. 53.

And it seems admissible to compare the
writing in question with other ancient writings
having the same signature, when the latter
have been preserved as authentic doc-
uments. - 11th.

And it seems that a person professionally skill-
ed in detecting forgeries - as a clerk on
inspecting grants at the Post Office, may tes-
tify his opinion from his acquaintance with a
writing that it is a forged hand. - 11th. 53. 117. 5 Esp. 113.
See 105. 6. Appdx. 1112.

There are cases in the written instruments, may
be read with direct proof, & their Ex.
Ex. When introduced by an adverse
party or previous notice for 3^d purpose.
— 29 R. 434. 5 Do. 366. Rea. 108. 9. 17 John. 138. 2 Campb. 94.
3 Taunt. 62.

The holder in one case when an adverse party
was not party to it, produced
— it.

A deed of 30 yrs. standing may be read with
proof of Ex. — provided it is genuine. and
is below the provisions — & there is no ap-
parent erasure or alteration. Gilt. 100
Buller 225. Rea. 110. 1 Esp. 275. Esp. D. 224.
185. 104. 33. 2 Bl. R. 532. 2 S. R. 466. 5 Do.
255. — This is "ex necessitate rei."

The rule notwithstanding being founded
on presumption does not hold where there are
circumstances from which a contrary presumption
arises — ex. Alteration — erasure — inconsistent copy
of a subject. (2 W. 18. 5 Port. 45.) (10 Do. 92. Gilt. 104.)

So if a deed were of a reversion — of which there
is no copy. — & a subseqt. deed of the same
interest had been made to another who survives
in deed. Rea. 110. Bull. 255.

In these cases & ordinary evid. must prevail.
The presumption from antiquity being de-
stroyed by an opposite presumption —
Ancient deeds found un-
used and & numerous in title have been admitted.
— it.

The recital of one deed in another, may be con- sidered evid. re: recited deed - 15. 1. partly re: reciting deed. - Talk. 286. Bea. 111.

Notwithstanding if now re- quired as secondary evid. & admissibility when recited deed is shown to be lost or when some other reason is given for not producing it. - 2 Leo. 108. 6 Mod. 15.

Formerly if there was any variance, inter- ruption or apparent alteration - & judges de- termined on; view of propriety of it, whether it was good or not - whether it was the instt. & lived. or not. "Deed" 35. 10 Geo. 92. Gibb. 104.

But in modern practice, deed is left to jury upon & issue of "non est factum".

Q44 to alterations of & deed by party & by stranger - vide - "Deed" 34. 5. Goringe - Gibb. 105. 11 Geo. 27. Stra. 1100.

Explanation of Written Instruments.

14 deed or other instrument, when proved is con- clusive upon the parties to it - Hence it can't be contradicted by parol evid. - 5 Geo. 68. 8 Geo. 133. Hence all are stopped by their deeds. 37 Wils. 273. 1 Bro. Chy. 92. Bea. 112.

Grant a Latent Ambiguity arising in the con- struction of & see in other instt may be ex- plained, by parol evid. 7 T.R. 138. 100. 703. 1, Bro. Chy. 472. 2 Comit. 22. 69.

As a latent ambiguity is meant - an uncertainty arising - not upon the face of the writing - but from some extrinsic fact - probably as passed - in wh. case, the uncertainty may be removed by some kind of evd.
Rea. 112. 1845. 56.

In such cases, the evd. does not affect the construction of the instrument - it only ascertains the subject-matter - person to wh. it relates. Ex. & devise to J. there being 2 of that name. - 2 Ves. 216. 1 P.W. 420. 2 Do 35.
3 Maule & Selw. 171. 5 Co. 58. 8 Do. 155.

To show, devisees name is mistaken. -
Rea. 14. 2 P. Wms. 141. 104. 37. 8. 24. 11.

Glister is his name is wholly mistaken.
Rea. 117. 2 Atk. 240.

But declarations made by testator long before making the will - are not admissible. 1 P.W. 671. Rea. 14. n.

So if one having 2 names of Dale, leaves a fine of 3 "manor of Dale" circumstances may be proved to show that one was intended. Rea. 112. 1 R. 56. 676.

When there is a right name & wrong description, a mistake may be carried into effect by parol evd. if there is no other person to whom the description applies. It is void given uncertainty if there is.

same distinction when name is wrong & description right. - it.

To parol evd. is admissible to rebut an Eq. or to cut an equitable presumption or implication arising from & face of instrument.

For in 1st place it is discretionary with Ct. of Eq. to enforce an Eq. & in 2nd - presumptions prevail only when there is no evd. to rebut them.

ex. When one gives a legacy to his Ex. without disposing of & surplus, Ct. of Ch. will permit parol evd. to show that testator intended that & surplus shd. go to Ex.

For by L. & Ex. was entitled to it. & evd. is admitted to rebut a contrary rule of Eq. grounded on a presumption arising from & legacy - not to oppose & apparent intention accordg. to L. but to support it. -

But such evd. in support of the equitable presumption vs. & Legal is not admitted.

For a more full explanation of the doctrine of rebutting an Eq. see "Powers. Ch. 17. 1 Fortb. 384. 2 Rep. 299³⁷⁵ & D. Wms. 40. "Devises" 118. - Horn. 240. 2 Abbott 79. 241. 1 Wms. Ch. 201. 328. 1 Rep. 7. 40.

But where & devise expressly bequeathed & residue to & Ex. who over & testator by bond - parol evd. is not admitted to show that & testator did intend to extinguish the

bond. This sh. have been in & apparent
intent or legal effect of & will. Rea. 113.
Fall. 240.

To a fine being levied witht. declar-
ing any use, was admitted to vest the
use in & (committee) conveyee. Thus re-
sulting & presumption is a resulting
trust to conveyor.

Locus - if a 3^d person had claimed &
use & spent & void. ib.

To an implied revocation of a will - from a
subseqt. marriage of & testator & birth of a
child - may be rebutted by parol evid.
Rea. 114. Say - 31. tho such presumption can't
be established by such evid. 5 2 R. 148,
Rea. 114.

But a presumption of revocation arising
from a change of testator's estate can't be
rebutted - for here & intention don't govern.
"Levisy" 9. 103. Rea. 114. 2 H. Bl. 510.

A latent ambiguity i.e. one arising out of the
terms of & inst^t - can't regularly be ex-
plained by parol testimony - For ques-
tion arising upon & face of an inst^t are
matters of legal construction to be deter-
mined from & inst^t itself. Vide Ld. Bacon's reason
Rea. 116. Bac. evid. 82. - Latent is matter of fact.
2 Hen. 624. 3 Hen. 621. 2 H. Bl. 239. 3 H. Bl. 148. 5 Co. 680.

Ex. A devise to one of 3 sons of J. H. in having
seal, - viz. nothing less solemn than 3 instrumental. itself cannot
more of ambiguity.

In some exempt cases, notwithstanding
latent ambiguity, have been explained.
- & words not in themselves ambiguous,
have recd. a construction variant from
ordinary import - upon extrinsic proof
of the circumstances of 3 testator - of the
value of 3 property in question - of the
condition of his family - of 3 state of
his prob. - but not of his declty.

see 3 cases all explained in
"Devisee" 114.7. Row. D. 502. 19. Box. 110. -

see case of 3 "Bell" Tavern" Row. Dec. 502. 19. 6 Co. 16. 3 Kebl. 49. Pm. Chy. 71.
Talk. 234. 3 Burr. 1898. 1 Bro. Chy. 472.

But Parol evd. is not admissible to
contradict, enlarge or restrain an exp-
ress agreement. In writing. Ex. Written
agreement for a lease for 10 yrs. at £100.

Parol evd. yt 3 Lessee was to pay a
greater or less sum, or yt 3 time was 5
or 15 yrs. - is not admissible.

1 M. R. 1249. 3 M. R. 275. 1 Br. Chy. 472. 92. 249. 1 Fentl. 108.

6 M. R. 452. 1 Row. Cont. 249. 439. 18 Johns. 45. i.e. of Dudas & Wills
not of unsealed writings.

But when 3 writing is unsealed - &
not 3 evd. is admissible, but for the
stat. of frauds? 1 Row. 249. 18 Johns. 45.
3 Co. 50.

But collateral matters about wh.
3 written agreement is not conversant may
be proved by parol. -

Ex. that 3 less-
or was to repair - And parol evd. is al-
ways admissible to show that 3 intent in

question is not \S act of the party whose act it purports to be. - *Ex. that a deed was not sealed or delivered as \S L. requires.*

*That a deed or devise was falsely read to \S grantor or testator. *Ac. Dea. 178. 8 D.R. 178. Sept. 28.**

*It is true an instmt. illegal as to some-
thing. *Dea. 49. 2 D.R. 178. 3 D.R. 178. Dec 2. 178.**

In such cases \S void. is not admitted to contradict a valid instmt. but to show \S it is not what it imports to be - to set it aside.

*To show that an apparent illegality in \S instmt. was occasioned by a mistake in \S scrivener - as \S reservation of illegal interest. *2 Mod. 307. *Ex.***

If an ambiguity arises in an ancient instmt. uniform usage under it sh. if in the nature of a practical construction, may be admitted to explain it. -

In a covenant for a renewal in a lease with \S such former renewals was admitted to show \S a perpetual renewal was intended. -

A receipt not under seal may at \S L. be explained or contradicted by parol evd.

*Ex. A receipt expressed to be in full. *Phil. 74.**

27.22. 5. 5. or 800. 12 Johns. 331. ib. cas. 145. 2 Johns. 6. 578.

For such writing is of no
greater solemnity at C. L. in a sealed con-
tract - only prima facie evd.

So of Bill of Lading ab. includes a receipt.

Ex. Recd. in good order &c. This may be
contradicted by parol evd. Phil. 74. 6.

7 Mass. 297.

So an acknowledgment in a deed by trust-
tees of consid. recd. - one of them may
show by parol that whole went into the
hands of the other. This is consistent
with a deed.

But in genl. it is so. - a written contr.
not sealed - can't be contradicted nor
varied - nor in case of a latent am-
biguity explained by parol evd. at
C. L. independently of Stat. of frauds,
provided it is complete in itself & capa-
ble of a sensible explanation. Mass. 27.
234. R. 1247. 23. 309. 305. See. L. upon
original principles of C. L. Art. 94. 7. R. 551.

Of Parol Evidence.

Who are & Who are not Competent Witnesses.

A person is said to be a competent witness when he may legally be admitted to testify at all - & competency is a question of L. to be decided by the Ct.

His credibility is a credit to wh. his issue more is entitled - & this is a question of fact - left to the Jury. *Ida. 189. n. Bur. 117.*

In general all persons not rendered incompetent by some legal disqualification are admissible witnesses. *McC. Hall. 98.*

No person can be admitted as a witness who is "non compos mentis" not in the full sense & exercise of his understanding. *Ida. 122. Gibb. 177. Lev. 37.*

Idiot, Lunatics, in their lucid intervals, are not admissible. *Ida. 140. 3. Bull. 293. Gibb. 144. East. 40.*

Persons intoxicated at a time they are offered as witnesses are rejected - for a temporary derangement of mind. *16 John. 143.*

Same Rule applies to infants & so tender as to be incapable of understanding & oblig-

ation of an oath. -

an inf. of 14. is prima facie as capable
as an adult - so as to be admitted
upon 7 party objecting to his admission -
Mc. Kall. 149. -

Under that age is competence depends upon
his apparent understanding - wh. is to be dis-
covered by a previous examination. See 123.
Gillb. 144.

It has been sd. that no one under 9 years
ever been admitted to testify - & even so.
For any one under 10 - children under
this age are of course rejected. -

The Rule notwithstanding appears to be now,
that a child of any age may be exam-
ined, if he appears upon a previous ex-
amination to be acquainted with the na-
ture & obligation of an oath. (Post 70.)

Thus an inf. of 7 yrs. old has been ad-
mitted even in criminal cases. - Inf. 48
Leach. cas. 782.

Formerly inf. too young to testify under
oath were allowed to testify with oath.
Mc. Kall. 130. 291. 1 Hall. D.C. 534.

But this practice is now exploded - & inf.
are allowed to give evd. under oath - or not
at all. - Leach cas. 114. 346. 104. 1 Mc. Kall. 151.
242. 29.

A slave is not as such incompetent.
McC. 98. Hall. 150. 145. n. b. & as to state
holding slaves they are excluded in every
one another in a capital case.

A person deaf & dumb is shown to possess
sufficient understanding may testify by signs
thru a sworn interpreter. -

Where ignorance may disqualify a per-
son from being a witness - as ignorance
of the nature of an oath or of future state.

The previous examination in this case was
on the "Voice Dire". - Qu. shd. it not be with
oath as in case of English?

It was formerly supposed that
an infidel was incompetent - as having no
regard for the obligation of an oath. -

But now, all who believe in a God, & ob-
ligation of an oath, & future state, are com-
petent. Dea. 11. 2. 1. Ath. 21. 1. Phil. 11. McC. 98.

So if infidels believing those doctrines, are
admitted to testify, or being sworn accord-
to testimony of their own religion.

Still those persons that disbelieve
either those doctrines are incompetent.

McC. 98. Hall. 150. 145.

And, proper inquiry on this point is not
whether a witness believes in a God or the
future state - but whether he believes in

of a born doctriener. Peak. exp. 11. Inst. 50. 1 Mo. 8. 26.

The question whether a person, offered as a witness believes these doctrines is usually decided it seems - not under oath before he testifies upon a issue - but by examination.

But the enquiry has sometimes been made by way of cross examination. Qu. Is this answer? In the objection goes to his taking an oath. 4 Day 5. 6. 7.

Our own Cts. have admitted proof of the previous decln of a witness, to show his disbelief in these doctrines - & thus exclude him 4 Day 5. 1.

Qu. Can such proof be admitted on principle in to contradict his answers on his own examination & thus to discredit his testimony? If it can, a witness may by false declns. out of Ct. & when not under oath deceive a party of his testimony.

See 2 Inst. 49. 2 Des. 40. 13. 4. When a witness's confession of interest - when under oath - in another case was admitted to destroy his competency.

Quakers who believe it to be unlawful to take an oath are admitted by Imp. St. 7th 8th 11th 3rd & 1 Geo. 1. - 3 & 22 Geo. 11. to give evid. in civil causes, witht. oath, upon affirmation. 2 Stra. 1219. Pra. 143. But not in Criminal Proceedings. Pra. 143. 1 East. 382. 5 M. 58. 15. 72. 8. 1 Stra. 854. 72. 946. 200. Burr. 11. 17.

But a Quaker's affirmation in the form of
an affidavit may be read to exculpate
himself in a criminal proceeding.

Dea. 173. 2 Burr. 1117. ante 102.

In Count. Quakers are by Stat. enabled
to testify upon affirmation in all cases,
criminal as well as civil.

It is of all persons conscientiously oppos-
ed to taking an oath.

A person may be incompetent to tes-
tify from infamy of his character.

Rule. - A person legally infamous is
an incompetent witness in any case.
Dea. 124. Gilb. 138. Stra. 833. 1148.

The persons 'legally infamous' are meant
those who have been convicted of some in-
famous crime - treason - felony - perjury
- forgery - or any crime wh. in its nature
impairs his integrity - as barratry or
conspiracy. Dea. 128. 7 Leach. c. 382. or 476.
308. 2 Will. 18. Coop. 3. 5 Mod. 75. 1 Mc. Hal. 21.
37. 463. 1 W. 52. 1 Stark. 690. Stra. 1148. Gilb. 138.
Comm Dig. test. n. 2.

Formerly conviction of an offence wh. in-
curred infamous punishment - as 3 years
imprisonment was considered rendering the offender in-
famous, whatever offence may have been

Dea. 127. 1 W. 52. 2 Hall. P. C. 277. 8.

1 Mc. Hall. 140. 200.

But it is now determined, that the nature of a silence & not a punishment. decides of infamy. 10th. 689. 46

Hence conviction of an infamous offence renders a offender incompetent to a punishment. shd. only be a fine - as - Barraty. 127. 2 Gillb. 140.1.

Ex. Contra - the conviction of a libel - the judge is not destroyed - does not destroy one's competency. 127. 3 Leach. 320. Mc. Hall. 207.

When legal infamy is merely a consequence of conviction, a party is restored to competency by a pardon from the executive Govt. - as when one is convicted of perjury - or any other infamous crime at C. L. 128.9. 1 Feb. 148.

2d. 2d. 257. 8 Leach 389. 1 Mc. Hall. 213.7. 7 N. 403. 10th. 689. 2 Hawk. 558. 609. 185. 724.

Whiter - when a incompetency is made, by Stat., a substantive part of a punishment. - 12d. it not be more correct to say a part of a judgment or sentence - as on a conviction of perjury under Stat. 5th. Eliz. 127. 1 Mc. Hall. 235.

10th. 514. 690. 3 Leach. 426. Com. test. a.s.

For extrinsic pardon dispenser only with legal consequences of a judgment. it can't destroy a judgment. wh. as regards legal infamy.

not is executed or removed. In the last case
nothing short of a general reversal of a judge
in a conviction - or a habeas corpus will
restore his competency - either of these will re-
store it. But no.

If one is convicted of a chargeable gel-
one & burnt in a hand & ruin his
competency - or it amounts to a state of
war.

So now under Stat. 14 Geo. 3^d. 374. if whiffed
or fined - but conviction in these cases ma-
ke no credit. (Dubtr-Gid.)

Com. Dis. tot. a. s.

But a conviction of an infamous crime
with a judge in pursuance of it is no
disqualification by a witness.

For a verdict with a judge if no evid. of a
fact found in it in any case.

But proof of execution by a judge is in
evidence of punishment is not necessary for
the infamy recd. by a conviction & not
depend upon punishment.

And it seems now settled in principle, after a
series of contradictory opinions - yet proof of a
witness's legal infamy can be made no other way,
than by producing a record of his conviction.

8 East. 12. 2 Black. 45. Bull. 292. Com. Dis. tot. a. s.
8 East 123. 13 Johns. 82. Mc. Wall. 286. Lark. 653.
12 Mod 589. 11 East 509. 2 Starkie 51. 241. 1 Doct. N. P. 541.
Dowd. 553. Le. Rd. 1088. 10 Ves. Jr. 241. 2.

Tho- there have been cases in wh. the witness
has been called - to disclose the fact upon
the "wire fire" -

But this practice seems entirely opposed to
principle - For 1st, if one is bound to excuse
or disgrace himself - then on an indictment
for rape - a woman is not obliged to answer
as to any prior connexion with others - Nor
is a man obliged to answer whether he is the
father of an illegitimate child.

Phil. 206. 3 Com. 210. 518. 13 East 58. n.

2^d The party who produces a witness, has a
right to insist upon his not being prejudiced
in his proof or security - by matter app-
earing upon record. no record evid. is
produced. ante 36.

3^d A witness is not presumed to under-
stand the contents, or construction of a record
or the precise nature of a conviction. It
must be judged of by the Ct. by inspection.

Whether a witness is obliged to answer
any question - & answer to wh. wd. tend to dis-
grace him, tho- it wd. not charge him with
any crime - is not to be fully settled.

Dec. 29. 138. Phil. 206. 78. 210. 13 E. 153. H. 748.
2 Co. 670. 6 Co. 259. 13 E. 153. 82. not on principle.

Whether a person wd. be bound to give evid.
wh. wd. subject him to a civil action. see Phil. 208.

But by Stat. 46 Geo. 3^d it is enacted that he is.

3 Com. 2. 529. 13 E. 153. 82.

A person legally infamous is not disabled
to make an affidavit in defence of a
charge ^{as} against himself - if he were he
might be deprived of the means of defend-
ing himself. *2 Ark. 401. 501. 52. 1 Mo. 211.*

This point has often been ruled
upon motions for information or attach-
ment. *2 Ark. 401.*

The genl. character of a witness
not legally infamous may be proved -
not ^{directly} to exclude him as incompetent
but to detract from his credibility.

2 Ark. 129. 5.

The evd. sh. th. L. permits this to impeach his
credit is confined to his genl. character - Partic-
ular facts can't be proved for this purpose.

For he can't be presumed ready to meet
specific charges vs. him without notice.

*2 Ark. 125. Bull. 290. Phil. 212. 7 Rep. 102. 7
12. 543.*

Evidence of this kind can be given only
by those who are acquainted with the witness.
His genl. character - & the question in ^{evd.} is
whether he ought in their opinion to be be-
lieved when under oath? or whether they
ought not to believe him under oath?

In Court. the only question allowed to be
put is - What is the witness's genl. char-
acter for veracity?

The individual ^{or} ^{of} ^{the} ^{impeaching witness} ^{as to} ^{the} ^{other} ^{veracity}
is never allowed to be put admitted in 40 State

But the genl. evd. only can be given to im-
peach & credit to a witness - & yet the party
producing him, may call on the impeach-
ing witness to disclose & grounds of their opi-
nion. Pra. 125. 4 Esp. 103. 4 Phil. 214.

If witnesses to a will are dead - & granted
in proving it imputed to them - & devisee
may give evd. of their genl. character or
solvency. 4 Esp. 310. 10 Phil. 144. 2 Phil. 212. ante 86.

If they were alive & testified - their genl.
character as testifying witnesses may be im-
peached - as in 3 last page.

Previous declns. made by a witness out of
Ct. & wh. are inconsistent with, or discredit
his testimony - may be proved to dis-
credit his testimony as evidence. Pra. 128. 6 Phil. 412.

2 Esp. 691. or a letter written by him.

3 Traines 279 or a deposition signed by him.

And after & death of a subscribing wit-
ness to a will - his confession on his death-
bed may be given in evd. to counteract
the presumption arising from his attes-
tation. Pra. 129. 3 Buir. 1244. 55 Me. Hall.
386. 6 East 188. 20 Phil. 125. ante 18.

The party producing a witness is never
allowed directly to impeach his charac-
ter even by genl. evidence. But a party

may exhibit testimony contradictory to
what his evidence has sworn. Hence the
impeachment, if any, is only consequential.
2 Starkie 334. Bea. 129. Lept. 144.
Phil. 213. 75. 297. 2 Womp. 366.

In answer to evd. vs. & credit to a witness,
& party producing him, may attack the
character of & impeaching witness, or give
evd. in favour of & character of his
own. Phil. 212.

In Court. he may by way of answer
to such impeachment. Prove that his wit-
ness has made & some statement on other
occasions - as in his testimony.

Phell. 294. Gilb. 135. 1 Mod. 282. Phil. 212, 22.

The testimony of a witness may be discred-
ited, by showing that he was intoxica-
ted at & time of & transaction testified
about. Lept. 144. 2 Day 201.

An accomplice may testify either for
or vs. his fellow, tho' in the latter case the
& prosecution is civil his intt. will go to
his credit. Bea. 158.9. Hard. 163. 1 Mc. Hall
180.98. 203.4. 379. Rob. 17. Stra. 420. Lept. 70
Wull. 280. Reg. 725. 2 Hawk. 608.9.

In testifying vs. the Def. in a civil case, if
he not interested in & event, as a recovery by
& party. or. bar an action vs. himself for &
same wrong. and doubtless his credit may

is affected by offense or wrong of which he confesses himself guilty.

And if an accomplice whom a party or prosecutor wishes to call as a witness, is made co-defendant, & party, if the case is civil - may with leave of the Ct. strike out his name - & in a criminal case a prosecutor may enter a "Nolle Prosequi" as to him & then examine him. 22a. 138.9. Bull. 183. 13d. 441. Post 120.

That an accomplice has received a promise of pardon or reward, on a condition of his giving Evid. goes to his credit & not competency. 22a. 138. Mc. Kall. 140. 200. Kel. 18. 2 Wash. C. 40. see contra. 2 Hale's 280.8 1 Mc. 194. 201.

Note - If the condition was that he wd. testify vs. a party wd. he be competent? 1 Mc. Kall. 194. 200. Kel. 18. 2 Hale 288.

Perhaps it wd. be difficult to show, on principle, yet a public ed. in this way be derived of his testimony. But the fact wd. greatly impair his credit.
Dangerous to confide in such evid.

Another of the most usual grounds of incompetency in a witness is interest. Formerly an interest in the question on trial, rendered a witness incompetent.

1 Tra. 1042. 22a. 144.3. 2a. 283. Phil. 35.6.7.8. 17th. 300.

Q^d an Interest in the question, is
meant & interest the witness has - or the in-
fluence he is under from being in the
same situation as & party by whom he
is offered, in relation to & fact to be tried -
or in other words - from his having been
or being exposed to the same claim - sh.
may arise out of & fact in question - that
his right sh. not be affected by the ver-
dict or judgment, in case in which he is offer-
ed as a witness. 144. 3 Phil. 30.

Ex. action vs. one under writer, &
another upon the same policy - offered as
witness for him to prove some fact wh.
sh. be a defence to both or for both -
in an action vs. one commoner - & a pol-
icy commoner offered on his side.

Separate Indictments vs. c^d. & B. in bar-
rers, or swearing to the same fact - & A.
offered as witness for B. -
created by mast. for beating his servt. and
with a "per quod" & the servt. offered as
a witness for him - one person injured
by a third offered as a witness for
another injured by the same trespass.

For the event of the suit,
whether it may be, does not affect the
witness. 8 Johns. 377. 100. 100. 100.
944. 1054. 3 Phil. 18. 1202 122.

contra Stra. 414.

But it is now settled since & case Dent vs. Babel
3 L.R. 10 that the species of interest goes only to
credit of & witness & not to competency. 100. 100.
100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100.

4 Do. 20. 559. 1 H. Bl. 303. Hard. 358. -

Hence in the examples given above of an action vs. one underwriter, & witness, tho' interested, is not incompetent. 3 J.R. 36. 1 Do. 302. 2 Roll. 685. 2 Phil. 7. Bull. 285. 3 J.R. 504.

And the Genl. Rule now is that the witness is not disqualified on 3 ground of interest, viz he is interested in 3 event of 3 suit, i.e. in a situation to be immediately benefited or injured by 3 event of it.

Rea. 144. 2 Phil. 5. Johns. 83. 4 Do. 302. 5 Do. 250.
1 Bay 208. 70. 2 Do. 531. 5 Bin. 316. 1 Hard. 6.
Starkie 68. 4 Taunt. 18.

Hence a woman, whose husb. has been convicted of a capital crime, was admitted as a competent witness vs. others indicted for 3 same offence, tho' she confessed she hoped 3 conviction of 3 others might secure her husb. pardon - a pardon not being a necessary consequence of 3 conviction of 3 others.

Rea. 45. Phil. 37. 1 H. & Bull. 176.

So in Criminal Prosecutions, 3 person injured by the offence, is regularly a competent witness for 3 prosecution - tho' he may have a claim vs. the accused for the civil injury involved in 3 crime. Rea. 146.

4 Burr. 2225. Phil. 86. 90. 7 J.R. 70. 1 Cow 9. 181.
4 East 581. 1 Taunt. 520.

For he has no interest in the event of 3 prosecution or 3 verdict in it - not be given in favor of or vs. him. - The interest or influence goes to his credit.

note. Amongst the verdict in the prosecution
can be given in evidence in his civil suit.
But there is no case I trust in which
it can be so given in evidence.

125. 5. 140. 8. Phil. 87. 8. & East 577. note
581. & 151. & 222. ante 60.

Thus upon an indictment. vs. H. for a
battery vs. H. or for stealing his goods. B. is
a competent witness - this has never been
questioned. 125. 148. 221. Phil. 86. 7.

125. 211. 221. 229. 125. 33. 125. 40. 5.
220. 585.

118. It is upon an indictment. for robbery, the Thew
is entitled to a restitution of his property
on conviction. For he is entitled to his property
if it is his, whether a conviction ensues or not.
Phil. 87. 7. 125. 20. 229. 290. 125. 50.
51. 110. 44.

It is in prosecution for a cheat. Phil. 87.
125. 40. 221. 431. Salk. 280. contra Salk. 283. 125.
1042.

It is in prosecution at C. L. 125. 1042. 1004. Salk.
282. 281. But these & last authors are overruled.
4 Burr. 222. Phil. 87. 125. 107. "End" 140. 8. n.

And in the case of perjury it is
not material, whether a witness has or has
not outlived his guilt. obtained vs. him by the
attender. Phil. 87. 4 Burr. 222. & East 577. 5 Dall. 112.
contra. 220. 97. 221. 12. 125.

It is in a prosecution for perjury under: Ant.

5 Eliz. ch. 9. wh. gives 3 party aggrieved half of
3 forfeiture. For in his action to recover
it, 3 record of 3 conviction upon 3 indictment.
- it is supposed - wd. not be evid.

Phil. 88. contra Gile. 124. 2 Roll 885. Bull. 289.
La. Ray 1229.

Qu. Wd. it not be evid. of the
fact of a conviction had been obtained?

How else co. 3 witness recover his half of the
forfeiture?

And are persons to whom bounties are
given by Stat. for apprehending & delivering
offenders, are competent witnesses
vs. them? Ph. 88. 744. Lea. 171. 2. 182. a.

Willes 322. Leach 290. Mc. Hall. 30. 31. 110. 14.

79. There indeed is a direct interest in the
event - But if their evid. was not admitt-
ed, 3 very object of that Stat. wd. be defra-
uded. That object being to induce those
having knowledge to indicate.

Lea. 171. 2. 182. a. 422. East 155.

3 Dall. 180. See. Lea. as to the propriety
of this.

So on an indictment for tearing a note. 109.
the promisee is competent. Ra. 147. Vira. 393. 7.

So upon a prosecution for money, the
borrower is competent to prove the whole case,
whether he has repaid the whole loan or not.

Ra. 147. 8. 4 Buir. 2251. 7 T. R. 60. 2 do. 496.

Cainey 168. 5 Chap. 53. Phil. 40. contra. 1240.

Same rule tho 3 note has been registered. Phry.
53. Phil. 96. 38. 34. n. a. 40. n. a. 722. 601.

But a prosecutor on a Penal Statute who is
entitled to suit & the penalty is incom-
petent to testify in support of the prose-
cution. 22a. 182. n. 18a. 318. & cases cited
182. 318. contra 211. 182. 318. 114. 22a. 318.
he is himself, 211. & can't testify in his
own cause.

But in a single case of a prosecution for for-
gery it has always been helden, & it is bar-
red by whom & instm. purports to have been
made is incompetent, if & instm. suppos-
ing it genuine wd. subject him to suit, or
deprive him of a right or claim.

2. East P.C. 995. 2 N.R. 87. 22a. 147. 8. 168. 9.
Phil. 85. 90. Hard. 351. 3 Talk. 172. 22a. 728.
Lush 1029. 255.

Rule the same it seems, even if the witness in whose
name & obligation is forged has before him it.

R. 48.

22a. 147. 8. in pur-
suance of instm. recovered - what possible interest &c.
there is in question?

This incompetency extends to every fact wh.
might conduce to prove & disprove. It is not
confined to & mere handwriting.

Phil. 87. 8. 22a. 168. 2 N.R. 87. 90. 2. East P.C.
990.

Issue of a collateral fact not conducing to
prove & disprove - as that & witness offered is &
person named in & forged writing. Phil. 89
Lush. 487. 2 East P.C. 997. Mc. Hall. 143.

22a. Upon what principle is the rule
founded? upon & effect of forgery.

2 East P.C. 994.

It is only to the extent of the
side & instrument may be found in favour of
a stranger. The practice of imp- 110.
ounding & forging initials - &c. not admissible.
The Rule seems to be an anomaly sup-
ported by strength of precedent.
Phil. 1861. n. 4 Johns. 296. 505. 2.

But on the other hand, forgery is not fol-
lowed by C.L. nor in all cases by the
Eng. & Cal.

The Rule does not hold, notwithstanding
that a party whose name is forged and who
is personally interested or affected by the
forged instrument, is restoring it genuine.

Ex. Teacher's name forged to a Bank note -
is a competent witness.

Leach 37. 350. Wash. 120. Rex. 107. Phil. 87.
Bull. 287. & East. 100. 1000. Post 158.

So where a Banker pays a forged Draft
and strikes the money out of his account,
thus destroying his claim for it - he was at
all times confident.

So where one whose name has been forged to
a receipt, and recovered from a prisoner, the
money it purported to be given for.
Re. 107. Bull. 287.

But where the person in whose name &c. is
at all affected by the instrument is genuine he
is not to be inconsistent - & the Rule has

been held to extend to all other persons in-
terested in & question. Thus an individ-
ual, for example, will & exec. named in
& will, will not be held not competent
to prove & other facts. Dea. 109, Leach 99.

Rule holds to be the same as to legate,
Phil. 90. Wash. 331, 3 Wash. 172. Dea. 109. As to
these cases - see Phil. 90. n. 4. & Burr. 2251,
where the principle is given of them. See.

But the person whose name has been co-
med to an obligation & against whom
indirect complaint is a release from the
party in whose favour & interest, per
sons to bind. Ex. given & under of a
supra will. Dea. 109, n. Leach. 184.
to release in a joint and se. Phil. 90.

In court. & genl. Rule excluding & partly those
name in forced was once later rejected by the
Dea. 109. See in 9 Mass. 179.

Phil. 91. n. Mass. 7. 3 Do. 82. 1 Dall. 1000.
2 Do. 239. 2 Cr. 2. 96. n. 4. 10 Mass. 296. 2 Cr. 3.

But a person interested in the event of a suit
if he is offered as a witness is regularly in-
competent. Dea. 144. 6. 184, 70. 2 Phil. 43. 9. 80.

3 N.R. 30. 7. 7 Do. 60. 603. 2 Do. 376.

4 Burr. 2251. 5. exceptions ante 108, post 11.

In an interest in the event is interest, an imme-
diate & certain benefit or disadvantage to ac-
cure to & witness from the event or result of
suit.

In other words a witness is interested in & event of

3 suit - one where he will or ; one must gain some immediate right or certain exemption from loss or liability by determination in favour of the other. By whom he is offered: - or on the other hand incur some certain immediate loss or liability to loss in consequence of a determination in favour of ; opposite party. Rea. 144. Gill 106. 7. 2 T.R. 20. 3 Do. 32. 2 Johns. cas. 236. 4 Johns. 82. 302. 5 Do. 257. 6 Do. 84.

2d in fact. tho' not universally, 3d question whether ; witness offered is interested in ; event or not ^{the distinction is} whether ; record of ; cause in wh. he offered can be afterwards given in evd. for or vs. him in any suit in wh. he may be party. Phil. 434. 9. 50. 3 T.R. 12. 3. 6. 50. 7 Do. 52. 4 East 58. 4 Johns. 230. 5 Do. 144 3 Exch. cas. 486. 4 East 572. 1 Bay 269. Post 124.

Note - This has in some instances been regarded the only criterion of interest in the event. Phil. 434. 9. 3 T.R. 12. 5 Do. 1 Do. 62. 2 Johns. cas. 236. contra. Phil. 50 4 T.R. 19. 5 Do. 607. 2 East 507. n.

2d then a verdict or judgment for the party who offered him & thus is given in evd. in the witness's own favour or a verdict for ; other vs him, he is of course & universally interested in ; event & regularly incompetent to act.

Note. it is not more correct to say if in recovery by ; party for the record is given in evd.

But if the verdict or finding cannot in these cases
be or is the witness - it is generally competent
tho. not universally so.

For there may be cases where
it is considered an interest in the event where
the record cannot then be given in evidence. These
cases of this kind are rare - being only ex-
ceptions to the general criterion.

Phil. 312. 4 R. 9. 5 de. 007. 2 East 501. in these
cases see Post 117. 27.

Under the first branch of the distinction.

In a suit by A. claiming right of common
in custom - B. claiming under the same custom.
is not competent to testify for B. - as B.
might afterwards use a verdict in support of
his own claim.

Phil. 445. n. 2 R. 302.
2 ro. 32. Bull. 283. 2 R. 731. 2 Johns. 170. ante 37.

Now in the question related to a private
prescriptive right of common - as a right of in-
creasing to the estate of A.

In this case one claiming a similar right
as belonging to the estate of B. is competent - for
this is not a public right - verdict is not void.
on the witness. Phil. 445. Bull. 283. 2 R. 731.
2 Johns. 170.

114. is a person liable for the costs of a suit on
either side is incompetent to testify on either side.
a verdict record will be void as to him.

action by Inf. pth. - his Guardian or Guardian
any is not a competent witness. Phil. 46.

Ita. 548. 1026. Gild 107. Dia. 158. 2 Bac. 080.
1 Eqr. cas. 72. 1 J.R. 491. 1 Kils. 130. 20. Wms. 298.
Hard. 281. "Part & Child" 30. 2 Com. R. 269.
contra - 7 J.R. 476 2 East 438. awarded 1/2 East 585.
1 Day 101. 1 Wms. 444. 5 Esp. 174. 4 J.R. 104.

So if any one has agreed to indemnify ^{or} dep.
vs. 3 costs & for the same reason. Phil. 46. n.
Dia. 103. 6. Ita. 315. 4 Johns. 37.

So if any one who has given security in re-
half of pth. for 3 costs - as co-surety in
bond for prosecution.

So if any one who is to receive 3 awards &
recovers or any part of them. Phil. 44. Ita. 134.

For the same reason Debt's bail can't testify
in him as they become immediately res-
ponsible for 3 satisfaction of what is re-
covered vs. him, & the record is evid. vs. them.
Phil. 46. 1 J.R. 104. 8 Johns. 407.

onus of a surety in an administration
bond, in an action vs. a Shyf. for breach or
neglect or default by his default - & latter
is incompetent for 3 Shyf. with a release.

Ld. R. 1411. Phil. 30. Ita. 630. 3 Com. 532.
Dia. 103.

It can make no diff. of trust - whether the
under Shyf. has given 3 Shyf. security or not - for he wd.
be liable even in any case. "Shyf. &c" 34.

go in an action for his master
for his servant's misconduct. Phil. 46. 4 T.R. 389,
5 Trea. 330. Dea. 100. 73. 84. 1 Esp. 22. 239.

The Record is in evidence to the
amount of damage.

Indeed a recovery vs. a master will con-
stitute his cause of action vs. a servant. See
last case. 406. 1 T.R. 184.

Where it is released by master. Dea. 107. 0.
Trea. 1083. Dea. 73. 84. 1 Esp. 239.

115. go in an action on a policy of Insurance for
a loss as a servant of a master, he is
not admissible yet; underwriters are released
by him, for if they are subjected, he is liable over
to them - & record will be evidence to him as to damage.
Dea. 100. 2 106. 10. 1 Esp. 22. 239, 10 Phil. 47. n. a.
Post, 181.

go in an action upon a policy on goods
shipped upon freight - & owner of the Ship is
not admissible to prove his seaworthiness. He will
be discharged - he released as the ship.
If it is not seaworthy - he will be discharged,
& the owner of the ship become liable.
Dea. 101. 100. 48.

Note - When the record is in case of a verdict
for defendant, it is evidence to the witness - for a lawsuit
of proving as damage & cost of first suit;
conclude it is.

go in a suit of interference with the acceptor of
a bill of exchange - accepted for the accommodation

of a drawer - the latter is not a competent witness ^{as to the} debt. to prove a transfer therein.
Phil. 45.7. 4 Taunt. 404. 1 Cow. 428.

1 H. Bl. 300. 1 Stra. 775. 1 Campb. 408. 10 Johns. 70. 179 Bl. 306.

For he wd. be liable over to a debt if
plff. shd. recover - for all sums as well as for
a amt. of bill. Post. 128.

Suppose it had not been for the drawers ac-
commodation - wd. he not be equally inconsi-
stent - as his funds in the debt. hands wd. be
liable to be applied to the debt.

So on the other hand if a witness for plff.
wd. by subjecting a debt. exonerate himself of
any liability, he is incompetent.

Phil. 47. n.a. Bea. cas. 847. 5 Day. 438. 2 N.R. 344.

4 Do. 638. 2 Mass. 394. 1 Stra. 306.

Case before

1798 surer on costs - inf's guardian, Bea. 47
1798. 508. 1026. Dard. 202.

So a grantor who has conveyed land with a
covenant of seisin & warranty, is indemnifi-
able to prove a grantee's title in ejectment.

Bea. 47. n.a. 5 Day. 433. 2 Johns. 394. 6 Johns. 228.

"Lost & Broken" 5 Day 373. Bea. 170. 2 Roll 085.

3 Johns. 82. 1 Do. 394. 6 Do. 523.

For if the grantee is evicted under clear
title, a grantor is bound to indemnify him.

Note - if the debt contained only a covt.
of seisin how wd. he be interested in a covt.
if he had been evicted in? He wd. be liable
or not independently of a covt. of the suit.

cont. - if covenants were liable for eviction
in 1st action - his interest wd. be in 2^d
action.

So if the vendor of a chattel, where the vendee's title is in question. there being an implied warranty of title. 10 Phil. 47. n. 5 Johns. 3. 4 Esp. 104. This seems the same case in prin-

44/5. 10%.

to This second & same case in prin-
ciple as & above of a cont. of seizure.

But a grantor - Lessor or Vendor - with out
 title or warrants express or implied, is ad-
 missible in support of title, not interested
 in event. Phil. 47 n. Dec. 170. & 175. 2. Bing. 31.

So if it has warranted more or less
claiming under himself, in it is competent as
to a part not claiming under him.

♂ ad. 47. m. $\frac{4}{1}$ Max's. 441. 2 Bin. 95. 108. 500.
♂ ad. 500.

if the inhabitants of a town or parish liable to be rated for a poor - if not actually rated, are competent witnesses on a town or parish question of settlement. - Their interest being contingent. Phil. 47. 4 2 R. 17. 5 R. 157. 2 East 361. 15 East 371. 12 Johns. 285.

They are admissible in Court.
the actually rated, from supposed necessity.

9th in support of a Qui Tam action for
a remedy wh. if recovered will go to the sub-
stant sp. soon of Town. Phil. 48. n. 12 Johns. 288.

A third person is not competent in fact to testify that he himself is not a defendant in person. He has an immediate interest in defeating the action. For if it did, proceed he wd. be turned out of doors upon Exr. Phil. 48. n. c. 52. 2 John. 255. 12 Term 1256. East 124.

This is an example of interest in the event. The record does not in evidence or in the witness in another suit. - ante 113. - But Exr. 2d. act directly upon his position.

Still as a general rule can a party testify for himself or his co-party - by reason of his immediate & necessary interest.

Dec. 149. Phil. 57. Litch 115. Term. 230. 10. 11. 596.
1 Day 108. 11 John. 128. 4 Day 188.

See exceptions page 128. 7.

So that he is merely a trustee - having no beneficial interest in the subject - for he is interested in the event - being liable for the costs. This liability is certain & his ultimate indemnity contingent.

Dec. 141. 5 East 7. Dec. 153. 7 D.R. 608.
10 Phil. 37. 2 Day. 407.

So as an Exr. whether 2d. or 1st. the when 1st. he is not liable in fact, for costs. Phil. 37. n. c. 1 John. 551. Id. 10. 10. 11. 289. 2 Feb. 12. 2 Term. 649. 1 Tra. 54. 2 East 157.

Is it now that his disbursements may not be allowed? Is it a maxim that presumption of interest shall not be rebutted? It seems the latter; for his interest in the former case is contingent. Ante 82. 1st. 36.

But an administrator "durante minoritate" is, after his authority ceases, a competent witness for & even for then he has no interest. 3rd. 97. n.c.

118. And members of a corporation having no individual interest in & suit - are admissible to testify for & corporation who had no beneficial interest in & funds - & are not personally liable for & costs.

Dea. 149. 50. 1st. 57. 98. Dea. cas. 155. 7. 1st. 220
& do. 462. 7th. 398. 3d. 401.

It seems when the corporators are personally interested in & subject - as in & right of common - exemption from tolls - stock in a bank. Fort. 251. Dea. 149. 1st. 92. 1st. 174. 5th. 174.

And smallness of interest in point of amount appears to make no diff. Bull. 290. Phil. 523. 39. 5th. 174. 11th. 58. Dea. 161. n. 1st. 251. 1st. 291.

But competency of corporators is restricted by disqualification. It seems! Dea. 161. 6th. 103. 11th. 225. 1st. 58. 1st. 174. 795.

It seems if disqualification is irregular - it may be set aside. 11th. 225. 1st. 58. Dea. 161.

to his resignation & his corporate franchise.
Phil. 38. Calk. 432. Com. 2. Franchise n. T. 30.
Post. 138.

In Court. members of public located corporations - as towns - Ecclesiastical societies - are competent in all cases when such corporations are parties. This is partly from the usual maintenance of individual interest - & partly from supposed necessity.

Phil. 38. n. Sept. 57. ante 31.

Could a deft. cant testify for his co-deft. for his evid. id. as to prove at least that they were not jointly liable as charged.
Ante 117.

But if in an action founded in tort - no evid. whatever is given vs. one of 2 defts. he is entitled, upon a close of 3 best evid. to be discharged, & may then testify for 3 other.
Holt. & Batt. 20. 1 Id. 237.

Phil. 61. Gild. 117. Bull. 285. 1 East 512. 12th 134.
2 Hawk. c. c. 240. 998. 307. 11th 288. 222. 152.
19th. 204.

Said to be discretionary with 3 judge whether he will direct an acquittal in the above case. - Not matter of right.
1 Phil. 61. n. a. 1 Bull. 275.

But if there is any evid. vs. him 3 whole case must go together to 3 jury. Phil. 61. Gild. 117.
Bull. 285. 3 Esp. 25. 14 Johns. 119. 15 do. 223.

So in *trigg. vs. A.* - charging the wrong to
have been committed by himself & Ds. -
It appears that B. ^{was} concurred in the trespass.
& that process had been issued vs. him, & an
attempt had been made to arrest, & the
process lost - he is not admissible on the
scut. *Ma. 133. Phil. 61. Bull. 288. Hard. 284.*
123. contra - 10 Johns. 21. Phil. 82. n. Du. upon
what principle? not surely upon that of
interest in the event - & he is not actually
party to a suit. Will. 11.

120. *Leas if none of these facts ap-*
pear. Phil. 61. Style. 401. 1 appax. 452.
6 Binn. 316.

If witness for D. is by mistake made
deft. & Ct. will on motion, suffer his
name to be struck out. & he may then
be examined for a D. *Phil. 61. Fed. 222.*
Bull. 285.

In the case of an information, & att. Genl.
may enter a ch. l. proc. as to one of them -
& then examine him vs. & others. *Phil. 61.*
Ma. Hard. 103. Ante 103. 22 att. 26.

In an indictment vs. several - one, having submitted
& in his plea, is competent for & others - the case
as to him being at an end. *Phil. 62. Ma. 833.*

But merely suffering indictment in default, does not
repeal his competence either for or vs. & others
for he is a party to a record - & a case even as to him
is not ended - *Quoad & James. he is still on trial.*

Phil. 62. 5 Esp. 55. 2 Bull. 285. 2 Campb. 333. n. 10 Joins. 7.

So where one of 2 Defts. on a joint contract has obtained his discharge under a bankrupt L. for he is a party to & record. 1 Phil. 62. n. 3 Es. 25.

Besides if 3 other Deft. shd. have 3 whole sum recovered - he is compelled the bankrupt to contribute, is prohibited by some positive provision of Stat. of Bankruptcy.

So in an action on a joint contract w. 2 if one suffers judgment by default, he is not admissible for 3 other - or if 3 action fails as to one, it fails as to both. Phil. 62.

For for 3 plffs. - for if 3 action prevails, 3 joints defaulted will be entitled to a contribution from his co-Deft. 1 Phil. 62. 4 Taunt. 752. 6 Bin. 319. 1 Day 33.

But is not 3 balance of interest in that case clearly w. 3 Deft. plffs? If so, why may he not testify for 3 plffs?

It has been held that one of 2 Defts. in trover, having suffered a default (the inadmissible for 3 plffs. 2 Campb. 333. n.) is still admissible for 3 other Deft. For he is subjected at all events - & is not liable, it is so for 3 costs of 3 issue. Phil. 62. 3 Esp. 333. 2 Binn. 152. 3. See also 3 Esp. 25. 2 Campb. 333. n. Contra - 6 Binn. 319.

For 3 joins may a 3rd Jt. Dam. vs. all 3 Defts. see Day 33.

Note - Is not 3 Rule, as first laid down, a departure from principle?

10th. But the party Deft. is liable for the costs
of the issue? If not - still there can be but
one apportionment of damages & the costs may
go to mitigate them - Suppose he were
called to prove damages in 3 other Defts. &
he might defeat any recovery.

If one of 2 Defts. consents to a verdict in
Exemption. vs. himself - for so much as he is in
possession of - he is a competent witness
for 3 other. Phil. 62.3. Bull. 287. For a
finding in favour of 3 other cannot ben-
efit him - The same recoverable being
nominal.

But a person liable with 11 Defts. or liable in
his own right, who not himself a party - is an
incompetent witness to defeat the suit. Pea. 115-70.
He may testify in support of it. Lamb. Phil. 307. n. ante 53.

Thus a partner of 3 Defts. is not admissible to
prove that he is solely liable - & yet 3 Defts. ac-
tually his agent. For the witness who is for
the supposition himself liable &c. is liable
for at least half of 3 costs recovered in the
2nd case. Pea. 135. 1st case 174. & Bur. 2127. It is in the
record to indemnify 3 Defts. for 3 whole.

But a release from 3 Defts. vs. restore his com-
petency. Pea. R. 33. 1712. 1 Exch. 103.

In Ex. one of sev. Defts. having no inter-

est may be examined on either side Phil. 63.

3 Atk. 401. 9 Amb. 393. 2 Esp. 214.

A bankrupt is not competent in an action by his assignees to prove & propy in himself - or a debt due to himself - or increase of his propy. &c. amount. his own influence allowance, Pra. 107. 8. Phil. 51, 98. 8. Bull. 43. Post 138. 2 H. Bl. 279. Stra. 507. 229.

As to his creditor - in increasing the Bank-
rupt's divisible fund - & creditor's dividend is
increased. Pra. 107. Phil. 51. Stra. 507. 5. 1st Ind. 427.
258. 2 Dall. 20. Mass. 237. 2 Dougl. 466. Stra. 630.
Indeed & suit is for the
benefit of & creditors.

And the Petitionary creditor, is not compe-
tent to prove & commission regularly issued
out - to support it - as he is obliged by the
bond to establish Bankruptcy.
Phil. 52. n.a. 2 Coop. 511. 4 Mass. 237.

But a creditor who has not proved his debt
under & commission, is competent to support
it - tho not so to increase & fund.

Phil. 52. Coop. 201. 2 B. R. 1273.

And it seems of other creditors - as they being
parties to the proceedings, are interested to
support & commission. Pra. 107. 1 cas. 8. But
their competency may be restored by a release
to & assignees.

123.

The Bankrupt is not competent himself to prove any fact necessary to establish a commission, for he is interested in supporting it as a means of obtaining a discharge from his debts.

Phil. 108. 51. Linn. 827. 2 H. Bl. 239. 7. 3 Esq. 22.

So that he has obtained his certificate & released his surplus & allowance - for if the commission is not supported, & proceedings under it are void - & he will remain liable for his debts. But in this case, he is competent to increase & fund - for he has no interest in it. Pra. 108. 51. Corp. 70. 108. 51.

But he is competent to explain any equivocal fact - resort to the part of assignees or other witnesses & thus to show it must be an act of Bankruptcy. Pra. 108. 51. 2 Esq. 287.

So to diminish his estate - as to disprove a debt claimed by his assignees - as due to him - for his cred. is vs. his interest.

Pra. 108. 51. Corp. 70.

124.

In Genl. as stated above, & records being admissible either for or vs. a witness in a civil suit - is the criterion of interest in the event. Phil. 48. 9. 3 H. R. 32. 7 Do. 62. 2 Esq. cas. 236. 5 John. 1. R. 237. 4 Do. 302. ante 113. 112

But it is not universally so - & there are cases in wh. a witness is deemed thus interested tho. & record wd. not be void for or vs. him. But such cases are few.

Thus in *Treys. vs. a Ship*. by A. for taking his goods in an *Exn. vs. B.* - B. is not competent to prove & justify, of & goods in himself - For tho' & verdict wd. not be evid. for or vs. him in 9th. relating to the title - yet his *Exn.* debt wd. be discharged if & *Ship*. prevailed.
Hence an immediate interest in the event.
17 Phil. 47. n. 52. 2 C. R. 331.

So in *Ejectmt.* between A. & B. - A. is not competent to prove himself & tent. in possession for tho' & verdict wd. not be evid. for or vs. him, yet if a recovery were had - he wd. be turned out in an *Exn. vs. B.* - 17 Phil. 48. n. 52.
5 Taunt. 183. 1 Johns. cas. 275. 12 Johns. 3246.

So that tho' & record wd. not be evid.
& *Exn.* wd. be enforced vs. him.

A Devisee is not competent to prove testator's sanity in *Ejectmt.* by another Devisee in the same will.
1 Phil. 374-7.

(Qu. Why not? Independantly of & objection arising out of the Stat. of Frauds? 3 Phil. 374-7.
Ld. Eld. 305. Count. 22. 4. Stra. 1253. 1 Burr. 414.

Yet any rate this is not an example - as supposed by 3 Phil. as an interest in & event.

For other cases of interest in & event where & record wd. not be evid. - see 3 Phil. 30. 3.

When a witness has an interest which is balanced
so that he stands in point - interest in diff.
event, he is competent to testify for either party.
Phil. 33. 2 Ex. 154. 4 Gillb. 129. 4 Nov. 476.

Thus an Indictment. vs. a county for
not repairing a bridge - 3 inhabitants of a
county are competent on either side - as to
necessity of repairs. They being interested
as well to have suff. bridges - as to avoid the
expense of repairs. 1 Vent. 351. 6 Nov. 307.

For the acceptor of a Bill is competent in an
action vs. the drawer, to prove no effects in
his hands if they dispense with notice.
2 Ex. 154. 1 Ex. 23. For he is alternately
liable in either event if he has effects.

For the indorser of a note having recd mon-
ey from; maker to take it up - is competent
in a suit by; indorsee vs. maker to prove
note satisfied.

For he wd. be liable in one event to the bill-
the indorsee - in; other to; draft. Phil. 33.
2 East 458. 4 Taint. 464.

And the comparative difficulty of the
witnesses enforcing a remedy vs. one or the other
party - where he had a claim occurring in either
event, seems not to affect his competency.

Phil. 335. 3 Sel. 379. 2 Day. 399.

In *Shipp v. The Ship Owners*, & capt. is competent to prove he recd. & money from & paid for & use of the
Deft. - His liability being no greater in one
event than & other. Phil. 33. 102. 2 M. 48. n. c.
1 Campb. 407. 8. Dea. 105.

For if he has recd. the money & not pd. it
over - he must be liable to one party or the
other, in any event - & if he has pd. it over
he is not liable to either. Starkie 27.

As in *Levett v. Rent*, when both parties claim
under J. C. he is competent to prove to whom
he made & first lease. Phil. 34. 3 M. 307.
2 Roll 838. Gild. 109.

As in an action by & Payee vs. & acceptor of
a bill drawn by one of two partners in the
name of & firm, either party is competent
to prove that & other one had no right to draw
a bill. Phil. 34. 13 East 175.

For & partner testifying will be as much expos-
ed to the claim of & Payee in one event - as to
the claim by & acceptor in & other. 4 Mass. 376.

As in *Levett v. Rent*, between J. C. & J. C. who has recd.
from & Deft. money due to & J. C. who has recd.
consistent to prove he recd. it as agent for & J. C.
Phil. 34. 3. 2 M. 480. Dea. 105. Sup.

128. Thus if the witness is liable to a great
or extent in one event than 2 other.

Ex. In 48st. by an Intervenor or acceptor of
a bill of exchange in 3 accommodation of the drawer
or the drawer is incompetent - For the liable
in either event for the debt - He is also bound
to indemnify & acceptor & of course
liable to him for all sums. 2nd. 33. Note 115

There are certain exempt cases in which a party
to a suit is allowed to testify from a
supposed necessity. 2nd. 30. Phil. 37.

Thus on the Stat. of 18th Geo. 1. the
2nd. of 17th Geo. 1. is competent in his
action vs. 2 hundred to prove 2 horses and
1 cart lost on behalf of other 200.
2nd. 38. 3rd. 39.

129. Thus as to other facts which in common or
simulation are provable by other witnesses
rather void. - as the slave case is within the
hundred suit. 2nd. 30. Phil. 38. Ward 83.
or he delivered money to his servant and was re-
bursed. 2nd. 30. n. 2nd. 30. n. & see 2nd. 30. n.
3rd. 39.

Thus in action for debt, 100 = 100
given in debt in 2 original documents, may
be proved by others in his defence. 2nd. 30.
2nd. 39. n. Phil. 38. 39. 2nd. 30. 3rd. 39.

This rule is supposed to be made for the
protection of the defendant - not the plaintiff.

There is no doubt in any case of the necessity
of it in the case of the defendant.

But one or both parties to a suit
are allowed to go to the trial to see the
evidence.

There is also in some cases where
an affidavit is taken in a case of debt, &c.
& is admissible as evidence in a subsequent
trial or appeal.

As the judge is under no moral obligation - but
under a duty to do so.

And so the Dept. is in the case on a single
portion attached.

In prosecutions upon the Stat. relating
to trespass in the night season - Sept. 8th
the Court. 99. 111. 94. 540. 60. 2 Day 110.

Upon a similar principle of necessity - &
in the case of Trade & common usage in
ships - agents or servants becoming interested 130.
in ordinary & regular course of their business
must be competent witnesses in their own
cases or of others who are interested in the case.
Sunt. 99. 5. Sunt. 131. 64. 7. 71.

Ex. of Facta may prove a sale of
goods for the principal, to charge the vendee
with the intention to commit a crime or to defraud.
Sunt. 99. 5. 111. 90. 111. 248. 249. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

One in genl. any one who contracts for another
or is an Agent within a Rule under a power
or authority. Phil. 94. 2 H. 2. 791.

Is in an action for finding 5000 goods in
his house - a master is not a competent wit-
ness for 5000 worth a release from 5000. He
is interested in it, won't go out of his way to
prove an act of his own in the ordin-
ary course of his statement. Lea, 100. cas. 3
87.

Is in an action for price of Insurance - so
much of the master - it is not admissible
for 5000. He released by him. Lea, 100.
1892. cas. 339. ante 115.

An Agent when competent to testify is not to
prove his own authority. Phil. 96. n. 2. 134.
2 Hall. 300. But he can't prove contents
of a written authority without producing it.
Phil. 96. 2 Hall. 247. 1 Esp. 405. n. 1. 10 Hag. 483.
ante-8. 79.

One who has purchased goods in
his own name testify for vendor if he
purchased them as Agent for Dept. - for he
is personally bound by the terms of the con-
tract. He must say in Dept. is not sufficient.
See - Note - a renalogy of the case to a dormant
partner. Phil. 96. n. 3. 10 Hag. 317.

It was once held that if a witness swears
to himself under a honorary obligation to
not a legal one, to indemnify a party he
was incompetent to testify for that party. 133.

Rea. 137. Stra. 129. Phil. 41. 2. 1 Kentill. 140.

Rea. 707. But the Rule has since been
denied & seems not to be so.

Phil. 142. 2 Johns. 219. 1 Camb. 147.

But it may go to his credit.

10. 3 Mass. 518. 8 Johns. 428. 1 Hall. 52. 2 do. 30

1 Count. 47. 1 Hall. R. 544. n. Phil. 490.

The interest in. excludes a witness must have
existence at the time it is sworn. when act or fact
in question took place - or have occurred ante-
rior to operation of L. or in act of party who
opposes him, as a witness - Rea. 137. 85. Phil. 100.

For an interest subsequent to acquire as
witnesses own act with concurrence of party
does not, as it has been said, disqualify him.

Since a witness might in every case deprive
party of his testimony - & it is possible party
might do it sometimes. Rea. 138. 87.

1 Johns. 580. 3 Ind. 27. 33. 47. 5 Johns. rev. 227. Phil. 100.

1 Stra. 486. 3 Count. 206.

2. Now a witness to a bond, or other contract held
that party claiming will recover in action
grounded upon it - he is still a competent wit- 134.
ness for party & is competent to testify.

Rea. 138. Bull. 296. Phil. 100. Skin. 386.

130. If a Prosecutor or other person, bring to
a commission or a crime by another, that a
wager, yet he will be convicted - & former is
competent & consultable to testify in support
of the Prosecution. 13th. 832. 1 No. 11. 147.
2 Sept. 832.

131. Where a Broker having procured B. to
underwrite a policy, after he has underwritten
for himself - it was held by Mr. Kenyon &
Ashurst - Judges - that B. sh. not be deprived of
his testimony, even if the latter had become
interested in the event. 3 T.R. 27. Phil. 101.

3 sample. 380. contra sample.
and 2nd. whether a person is not liable to be
& another person in the last case is L. - & intent
whether a share extends to any other case than those
in which a act creating an interest is either granted
or intended to deprive a party of testi-
mony or merely gratuitous & idle as in the above
cases of wagers. Phil. 101. 2. 1 No. 8. 147.
3 sample. 381.

135. For if a person acquainted with a trans-
action in which others are interested after in the
regular course of business & some side, is com-
interested in the event & a suit arising out of it,
he is according to the latest determinations in-
competent.

Thus when an underwriter who has insu-
red upon an account, yet is insured and re-
garded, if his action is another underwriter paid
or was called to prove as a witness, yet he was
not held to be incompetent.
Phil. 102.

But when a person having given a deposition while uninterested - afterwards becomes interested by operation of l. his deposition is admissible.

2 V. 42. ante-88. Post 137.

So if in a case becomes a party - as heir or exor. to original party. - 2 Vern. 577.

10. 284. 2 Atk. 815. contra in re becomes a party. Lalk. 286. Str. 101. Esp. 75. 0.

But in these cases 3 Depositions were "in perpetuum rei memoriam" to be used only after his death, & he was alive. See Bu. whether 3 Depositions in these cases were not admissible as 3 witness was uninterested at the time of swearing. ante. 88.

And on the other hand, in those cases in which a witness sues, or acquires a subject interest, or gives a party of his testimony, he sues by acquiring an opposite interest, privilege himself from testifying.

Ex. 98. A subscribing witness to an obligation, becomes a party, or executor - or party, & he is still compellable to testify to it. Exor. Peak. 185.

But when a person who becomes interested by giving bail for a party, or a party, or a party, comes to the knowledge of facts advantageous to 3 other party, he is not compellable to testify to such facts as this case tends to subject him on his own oath - & his interest was antecedent to his own knowledge of facts in question. Phil. 101. 2 Rost 406.

But when a subseq. interest in the event is cast upon a witness, by operation of law, he is incompetent to testify in support of his interest - & is liable to testify w^o it.

Ex. An heir apparent who being ignorant of facts relating to his ancestor's will, after succeeds to the inheritance. An attesting witness to a bond who afterwards is appointed ex^r or admin^r to a leg^y or obligor.

Phil. 302. 3. n. 10. 11. 289. 2 Term. 699. Tra. 34. 5.

Tal. 312. 2. 217. 12 East 183. 3 East 7. ante 82. 117.

So if the interest accrues by the act or connivance of the party offering the witness.

Ex. A witness to an original bond becomes bail to a leg^y cast testifies for him - or a subscribing witness becomes husb^d or wife to one of the parties.

Phar. 137. 85. 3. 1. 297. 2 East 183. ante 82.

Recapitulation -

1. Interest subseqt. by operation of law - disqualifies - is on other

2. By act of party offering - disqualifies

3. By act of opposite party - still competent.

4. By act of witness with concurrence of other party, if act is done in the regular course of business, disqualifies - except if fraudulent, unaccept^d wanton transaction - as a waiver.

So a rule. Rule the interest sh. go to the competence must also continue till time of trial. Hence the removal of it before the

time regularly reviews the constancy of a wit-
ness. Pa. 158. 2 over 139. Phil. 78. 5. 4 over. ab. 2 over.
14. n. 38. 1 Burr. 423. 7. 7 Burr. C.L. 97. Sta. 1235.
i'ov. 2 ov.

1745 to devise two releasing-opinions contra in
Lee & Campbell. Phil. 97. n. Tra. 1233. 230.
Rev. Dec. 124. 34. 1 Day 46. n. Wilson & construction
of Stat. of frauds. But the weight of au-
thority is in support of the Rule. Phil. 97.
Rev. 29. 33. And now by Stat. 26 Geo. 2. ch.
6. & issue or devise to a subscribing witness are
abolished void - & the witness can be sent to prove
& will as to & receive. Rev. 5. 122.3. Tra. 100. n.
This Stat. being declaratory of in affir-
mance of the Rule. Rev. 2. 129. 1 Day 41.8.

The Stat. makes the same provisions
as to Masters who have been 'det. or have
released' - or refused, bap't. on 'tender'.
Prov. & 123.

You the same & tat. creditors to isolation
being subscribers introduced are delayed com-
mitted: tho. their duty are changed by the
will on Lands. } Rev. D. 122.3 33.4.

We have a similar Stat. as to Devises & Legacies in wills executed after Jan^y 1st 1808. [§] proviso & instmt. is not otherwise suff^y attested - in wh. case the Devise or legacy will be good - & proviso & devise or legacy is not given to an heir at L. of the testator - if given to an heir, he can't testify in support of

3 will - & of course all the dispositions in it in
real estate are void - in it is suff. attested,
with his name - stat. counts. The ob-
ject of his execution is to protect heirs, who
are witnesses, & to lose to their testimony.

By the Cong. Stat. (supra) a subscribing witness
being a legatee, who dies before testator, or
before receiving, or before releasing his leg-
acy, is a legal attesting witness. Dec. 104.
Proof of his attestation made as in other
cases when a subscribing witness is dead.

It follows from the last gene. Rule a re-
lease to or from an interested witness as
in case may require or any other means, by
which he is divested of interest at time of
examination, will restore his competency.
Phil. 97.8. Dec. 138. Doug. 139. Post 149.

Thus in the case of person, if the
person whom 3 instant. purports to bind,
has been released by 3 party who wd. be
entitled to recover upon it or enforce it if
examine - he is competent to prove the
paying. Phil. 98. Leach 178. 84. 255. 1. 69. n.2.

So if the latter party has before set aside 3
instant. by a judgment, &c. &c. Bull. 289, Dec. 103.
ante 116.

So in an action by an indorsee of a
note or maker - an indorser being released,
is a competent witness for 3 plaintiff. 19 Mass. 173.
Phil. 97.

So a servt. for whose neglect the master
is sued may on being released, testify for
him. Pra. 166. cas. 53. Stra. 181. Phil. 95. 6.
ante. 131.

So a Bankrupt who has obtained his cer-
tificate & given his release to his Assignees,
may testify for them to prove m^ony. in him-
self - & thus increase the fund. Phil. 98. 51.
Pra. 169. Bull. 43. 2 R. 497. ante 123.

But not to support; commission - ante 123.

945 To Members of Corporations suing & sued.
vid. ante 118.

946 And when a release - payt. due to or from a
witness wd. if accepted restore his conscience,
a tender of it on one side - tho' refused on
the other will have the same effect.

Phil. 49. Pra. 158. Doug. 139. 3 T. R. 25. 2 Johns. 17.

Thus if a devisee or executor be-
ing being subscribing witness to a will, con-
victs a release wd. is refused he is compe-
tent to prove; will - or if payt. if the
legacy has been tendered to him & he has
refused, he is competent & compellable to
testify. Phil. 98. Pra. 158. 9. n. Doug. 139.
3 T. R. 25. 1 Burr. 357. 17.

So doubtless a servt. for whose negligence
master is sued, is compellable to testify
for master tho' refused. Pra. 158. So a
bondsmen for a prosecution in a release is

tendered him by Capt.

But if a person gives a deposition, while
interested in & event - & his interest is art.
evad. removed - & deposition is not admissi-
ble - For at the time of his testifying,
he is under the bias of interest.
Phil. 97. n. 1 Gaines R. 14. 3 Bin. 311.
Ex. Dotts. rail gives a deposition in his favor -
& the bail is afterwards changed.

138. A person is always competent to testify as to his
own interest tho' it is so, not solely, compul-
sible to do so. Pea. 100. 84. Talk. 691. ante 37.
La. Ra. 1008. Tra. 406. Doug. 372. 7 J.R. 178.

Persons are in some cases incompetent to tes-
tify by reason of the relation in wh. they stand
to one of the parties - Thus Husband & Wife, acc-
ording to & anti. rule, are incompetent either
for or vs. each other. Pea. 172. 3. Phil. 63. 4.
Co. L. 60. Bull. 286. Gill. 119. 2 Hawk. C. 46. 70.
100. 443. 4 J.R. 678. - ante 15. "Husb. & Wife" 32.

For & particular Rules & Distinctions un-
der this head - See title "Husb. & Wife" 32. 6.
"Par. & Child" 15 - ante 15.

Persons living as husb. & wife may upon the
question as to & legitimacy of their issue be
admitted as witnesses - but with regard to facts
they are competent to prove - see references, 135.
& Pea. 182. Phil. 180. 5 J.R. 330.

Counsellors - Attys & Solicitors are neither
compellable nor permitted to swear to confi-
dential communications made by clients in
relation to suits pending or in contempla-
tion. 176. Phil. 103. 4. 11 Mod. 40. 1 Vern. 198.
1 Bull. 284. 4 T.R. 482. 53.

For if either of them compellable to produce
a paper committed to him as a client in
another cause. Phil. 103. n. 1. 19 Mod. 370.
5 Day 496.

So tho' the suit in controversy - to wh.
communications relate is at an end - or
tho' the counsellor &c. has been dismissed.

178. Phil. 103. 4 T.R. 739. 60. 2 Campb. 378.
1 Esp. 695.

For can he testify in one case or give
things disclosed in another suit between other par-
ties. id.

These Rules are founded on the priv-
ilege not of counsel &c. but of the client - &
the obligation of secrecy never ends or ceases.

Phil. 103. 178. 1 Esp. 695. 4 T.R. 738, 9.

The Rule holds as to an interpreter between
parties & his counsel &c. he being the organ
of communication between them - is under
the same obligation of secrecy.

Phil. 103. 178. cas. 77. 8. 4 T.R. 730.

But this privilege of the client is confined to
such communications as are made respect-
ing professional business & during the relation
of atty & client. 3 Wms. cas. 198. 1 Mc. Nai. 241. 1 Taine R. 137.

Hence an Att. in succession. But not re-
served as such if not within the rule, the
he may have been consulted confidentially,
for in such cases of relation does not ex-
ist. Phil. 103. Dea. 170. 4 T.R. 733. 60.

If the client waives his privilege & Att.
is allowed & compellable to testify. Phil. 103.

But a person who was confidentially
consulted upon the supposition of his be-
ing an Att. when he was not, has been
found compellable to testify to the discus-
sion made to him. Phil. 103. 6 T.R. 113.
via Dea.

And propositions made as an Att.
authorized to make them to; adverse party
may be proved by a 3^d person who heard
them - tho' not by the Att. himself. Phil. 103. 4
2 Campb. 10. for the privilege extends only
to the cases of Att. - Counsel - & Solicitor.

Hence Physicians & Surgeons are com-
pellable to disclose information acquired in
the professional characters. Dea. 104. 86.
4 T.R. 739. Dea. cas. 77.

As to a Promissory priest to whom confession
has been made according to the practice of
Catholic church. Dea. 180. cas. 77. Phil. 103. 2.
1 Ch. & Call. 233.

So a portion of a private confidential friend to whom dis-
closure have been made under an injunction of secrecy.
Dea. 2. 180. Phil. 104. cas. 77. Bull. 284.

and it has been ruled, that a clerk to commissioners of a tax who had taken an oath to give not to disclose what he saw, learn a clerk, was compellable to disclose on ground that in such an oath there is an implied exception as to evd. required in a Ct. of the land it extends only to voluntary & extra-judicial disclosures. Phil. 104. 64. 3 Camp. 557.

And an atty. gen. to a party in a cause may be examined vs. his client as to facts known to him before he was retained or adopted as such - for he does not in such case acquire his knowledge by relation to his client - the disclosure violates no professional confidence. Phil. 105. 1 Fern. 197.
10 Mod. 40. 4 T.R. 739. 1 Wils. 53. 2 Do. 185.

So when he has attested an instrmt. to which his client is a party - he may be examined as to the exp. of it, for the attestation is not done by him as atty. but as a witness solicited by a party.
Phil. 105. Dea. 178. 4, cas. 108. 5 Esp. 32. 4 Do. 283.

So if he was present when his client swore to an answer in Chy. he may be examined as to the facts & the latter's swearing on an indictment for perjury.
Dea. 178. Phil. 105. Bull. 284. 2 Wils. 846.
contra. Stra. 1122. for the fact is not one communicated in confidence.

So in fact, as to any collateral fact wh.
he knew or might have known with any in-
formation from his client. Phil. 107. Bull. 280.
Sales Trials 383. as in relation to the fact
of an erasure in a deed or will - in wh. his
client is interested - But where his knowl-
edge is not derived from any disclosures from
his client - Phil. 107. Bull. 284.

As to the contents of a written notice re-
ceived from the adverse party. Phil. 107. East
357. So in debt on a bond Atty's
evidence has been admitted to prove from his
own knowledge, yet it is not way insurance.
Phil. 107. Ra. cap. 108.

So when after an action on a promissory note
has been compromised; Atty. informed his
opponent, yet the note had been given with con-
sideration - B.R. held, yet the Atty. was
compellable to disclose; fact. Phil. 125.
4 B.R. 332. Ra. 179.
For as Atty. in such suit he carries - theirs "functio
in officio".

And an Atty. has been compellable
to disclose whether a note put into his hands
for collection was indorsed or not. Phil. 107. a.
Gaines R. 258.

If an Atty. interrogates a witness on trial,
or witness in a subsegt. cause wishes to vary
from his answers given to such interrogato-
ries - the adverse party may call on the Atty.

to discredit his testimony by proving his former answers. *Rea. 79. Hale's Trials 253.*

For in this & all preceding cases of exceptions to 3 genl. Rule 7 Att. does not give his knowledge from 3 relations to his Client - & ergo violates no professional confidence. *Reak. cond. 178.*

It has been resolved, that a person who has put his name to an instrument, to give a sanction to it, is not admissible as a witness to invalidate it, being supposed to be excluded as a species of Estoppel.

Hatters vs. Shells 11 R. 296. The Rule appears to have been first adopted in the case cited. *Phil. 33. 2 Rea. 181. 3 Burr. 1244. 155. R. 265.*

Soon after 3 Rule was recognized in a limited extent as applying to negotiable instrumts. only. *3 J.R. 34. 54. Rea. cap. 40. 52.*

1 Exp. 298 Phil. 34. n. Ex. In an action by an indorsee vs. 3 acceptor of a Bill, 3 indorser was held incompetent to invalidate 3 instrument. - as proof of usury.

But in the case of *Lerdaine vs. Faskook*, 3 Rule was denied & 3 former case overruled. *7 J.R. 601. Rea. cas. 117. Exp. 176. 2 exp. cond. 96. 105. Bonnet 464.*

In sevl. of 3 U. S. 3 Rule has been recognized as limited above to negotiable instrumts. *2 Dall. 194. 1 Day 17. 309. 1 Gaines 258. 67. 2 q. 465. 2 J. 105. 3 Map. 156. 510. 6 W. 447. 7 W. 199.*

The rule in *Gardine vs. Sisk* has generally been
adopted in Court. 1 Mont. R. 260. 5

we conceive very correctly - For 3 objections
to it are rather to the proof of the fact, than
the inconsistency of the witness - Accordg. even
to this Rule or rather case, we are competent
to prove subseqt. facts wh. do not render 3
instmt. originally void. 1 May. 470.

2 Phil. 34. 32. 6. May. 27. 11 Chas. 128.

Examination of Witnesses.

Objections to the competency of a witness may be taken by examining him, before he is sworn in chief - upon a "voir dire" - or testimony of other witnesses swearing to the facts wh. render him incompetent - or upon his own examination when sworn in chief. Pra. 186. Phil. 96. 50. 204. 104. 104 Mod. 193. 122. 719.

Formerly the objection d. be taken only in one of the two modes - But as practice now is, a objection may be taken after he has been sworn & examined in chief - & indeed when it is discovered at any time during the trial, if he is incompetent - he must be rejected. Pra. 186. Phil. 96. 122. 719. 204. 39. Phil. 204. 1 Mod. 408. 6 Johns. 52. 3.

The mere fact yt a witness is discovered after the trial to have been incompetent, is not sufft. ground for a new trial - tho. it may have weight in connexion with other facts. Pra. 187. 122. 719. or Trials.

Upon the "voir dire" no question is proper in such as go to the competency of a witness. Such as relate merely to his credit - are inadmissible under it oath. The sole object of examining a witness under pt oath being to exclude him. 1 John. Ball. 147. 208.

Upon an examination under a "voir dire" a witness may be interrogated as to instruments executed by him or other, & as to the credit or interest in him with producing them.

For the party objecting is supposed not to know what witnesses will be called vs. him & of course not prepared with evd. of his in competency. *Ida. 187. 2 & Tan. 433.*

The objection arising from witnesses answering on; "voir dire" may be removed by answer under the same oath. *Phil. 90.*

And the last rule holds as well in the latter case as in the former - Hence if upon the "voir dire" a witness confesses himself to have been interested he may restore his competency by his own testimony under the same oath with producing & recd. or instrmt. by wh. his interest had been distinguished. Ex. That he has become a bankrupt & has recd. his certificate - That he was formerly member of a corporation wh. is a failed he has been disfranchised &c. *Ida. 187. 1 & 240. Phil. 91. 3. Ida. cas. 218. 1 & 2. 182. 15 & 16 37.*

For as the party objecting makes the witness in error on his purpose he can't object to such answers as operate vs. himself & recd. or the testimony of; witness himself may be removed by his own testimony.

Since if the original interest is proved by other witnesses in this case - a certificate must be produced to restore his competency - Hence the party objecting does not make a witness incompetent. *Ida. 187.*

If a Release is given to a witness on the sur-
pose of restoring his competence, it must be
produced. - Rea. 187. If the interest is disclosed
in himself upon a "voir dire".

The Declaration of a witness himself before
Trial if he is interested is not evid. to
exclude him - If it was - he might by a
guiltshood with the wrongfully deprive a
party of his testimony with the liability of a
guiltshood. Phil. 90. & Mass. 261.

But even if such a Declaration
made by the party offering his testimony
will exclude him. Phil. 90. & Mass. 487.

If a party objecting to a witness, ex-
amine him upon the "voir dire" he is ruled
by his election - & can not att. call other
witnesses to prove his incompetency, &
Rule holds the converse. Phil. 97. n.c.

1 Dall 297, or 72. 1 Mass. 219, Rea. 180. 10 Mod.
192.

Note - The Rule is the same when a witness
has been examined as to his interest, under
the genl. oath. And it applies also to dep-
ositions taken before a magistrate. 3 Dougl.

In the former case, notwithstanding, the party
may introduce other evid. to prove his
interest - to discredit - tho not reject him or
exclude him. Rea. 186.

The Attendance of Witnesses How compelled.

The ordinary mode of witnesses being compelled, or of compelling witnesses in civil cases is by writ of Subpoena ad testificandum. Pra. 191. Phil. 3.

If the witness is in possession of any deed or writing which is the subject at issue, he may be compelled by a special clause in the writ called a "duces tecum" to bring it into Ct. Pra. 191. Phil. 3. 12.

About the 7 witnesses if found unconditionally to bring the writing into Ct. 3 question whether the party is entitled to have it read in evidence may still be submitted to the Judge. Phil. 12. 9 East. 485. 14 Sim. 391.

And the witness is never compellable to show any writing which is evidence of his own or his wife's subject himself to any claim - as no one is bound to furnish evidence to himself - or to expose his own private writings for the benefit of strangers. Pra. 191. 2. 10. 108. 35. 9. 128. 408.

As to the mode of serving the subpoena in England see Pra. 12. Phil. 4. 3. Mod. 338.

In Court it is served either by sending, or a certified copy left with the witness - or at his usual residence.

It must be served in a reasonable time
tho no precise period is fixed. 3 Co. 192.
Lira. 710. 2 Judd. 807.

In Eng^d the writ issues from the Ct. be-
fore wh. a witness is required to appear.
In Cont. it may be issued either by the Ct.
in wh. he or by a Magistrate - as a "writ-
ten" of a peace officer or a constable. 105. Stat. Cont.

If witness tho. subpoenaed is not bound to
attend in civil cases, unless a reasonable
sum to defray his expenses in going to
remaining at - & returning from the place
of trial is tendered to him - or unless
he waives it. 3 Co. 192. Lira. 1156. Phil. 8.

If after due service & tender of a reasona-
ble sum for his expenses, a witness neg-
lects to appear, he is liable either to an
action on the case for damages to an attach-
ment for contempt - Dougl. 540. or to an action
on the Stat. of Edw. in Eng^d. and in Cont.
a similar stat. for a penalty - & a fine for a
further recompense given by the same Stat.
which to be recovered by the party aggrieved.

3 Co. 192. Dougl. 540. Phil. 4. Lira. 501. 2 Do. 810.
150. 150. 160. 840. 2 Burr. 1029. Camble. 449.

In Eng^d notwithstanding, the action for fur-
ther recompense under the Stat. of Edw. will not
lie, unless the amount has been previously

ascertained by the Ct. out of wh. the money is
due - But a return being made, debt will
lie for it. Phil. 4. Day 338. Doug. 255.

Note the stat. of Ct. in regard to
witnesses the appointment to the discretion of the
judge of the Ct. out of wh. & process issued
that this is construed to mean; Ct. out of
course - not & judge.

This Rule L. C. trusts does not obtain in Court
provisions of our stat. as to; further re-
compense being very diff. from that of Eng. pro-
viding for a recovery by action - will - claim
or information &c.

But the most usual mode of proceed-
ing in Eng. is attachment. Phil. 5. Sta. 108
15th, 168. Under wh. & witness may be
confined in contempt - & imprisoned till he
says not only; fine but & damns sustain
it by & early. Sept. 108. Doug. 340.

In Court. if a witness after due service
& tender neglect to appear, a capias may
issue to bring him before the Ct. to testify.

But this proceeding is not like & original attachment
namely a forcible seizure to the party -
the course of proceeding by attachment for trial here
has not been in use here. No there is no
legal impediment to its being introduced.

Note. But, note the Rule is
same if he attended - whether he was called to
testify or not?

37 If a person wanted as a witness is in custody under legal authority - or being on board a public ship - under an officer who refuses to allow his attendance; the subpoena being ineffectual - & ways to compel attendance is a writ of Habeas Corpus ad testificandum - by this process he is kept in custody - & returned to his former situation. Dec. 192. 2 Phil. 9. Foster 396. Cowp. 672.

38 If the prisoner wanted is a prisoner of war, the writ will not issue without the consent of the Executive or of a Secy of State as he is subject to the order of the Executive authority. Dec. 193. Phil. 10. Doug. 419.

In such case notwithstanding, he may, by consent be examined upon interrogatories without being sworn to.
as in Eng. if in custody upon charge of high treason. Talk. 193.

In Criminal cases, witnesses may be compelled to appear either by subpoena or by being bound in a recognizance to appear.
If they refuse to enter into such recognizance they may be committed for contempt. Phil. 7. To Hale Pra. cas. 281.

In Court the party accused of a crime is also entitled to a subpoena - for the production of his own, or in his own favouring

Engle L. - see Phil. 7: 2 Hawk. 40: 17.

In Criminal cases witnesses are bound to appear for the public with, and receive tender of money for their expenses - and by the C. L. there is no provision for reimbursing them - Phil. 8. It is now secured by Stat. 27. Geo. 2 & 18 Geo. 3.

The person of a witness attending on a cause, is protected from arrest in civil process - & his protection covers the time of his going - attending at - & returning from the place of trial. Vea. 173. Phil. 30: 283. R. 1113.

And in civil a subpoena if not necessary for his protection - if he attends upon a private request he is within the privilege. Phil. 5: 0. n. 8 & 22. 306. contra. Mag. 204. 1. 1. 538.

Same Rule holds if a witness attending from another State, tho' his attendance shd. not be compelled. 2 Johns. 294. Phil. 8.

This principle has been extended to parties attending upon arbitration under an order of the Court. Vea. 173. Phil. 8.

A reasonable time is allowed him for going to the place of trial - & returning - & in determining what is a liberal time

the protection of it, is liberal. 22a. 193. Phil. 5.
2 B.R. 1113. 22a. 986. 2 East 10. 2 Gall. 329.

If arrested in violation of his privilege
& let. on wh. he is attending with an
motion discharge him. 22a. 193.

The usual practice is in Court. To ob-
tain a writ of protection from a let. But
this is unnecessary. It is convenient in fur-
nishing evidence to the privilege to the off-
icer.

Depositions.

In Eng. when a material witness resides
abroad, he may under an order of the Ct.
or in vacation - if a judge, be exam-
ined "de bene esse" upon interrogatories
before commissioners - but this it seems
is not done with the consent of both par-
ties. 3 Phil. 10. 271. 22a. 60. 2 Fud. 812.

In Court. this proceeding is never necessary
the provided for by stat.

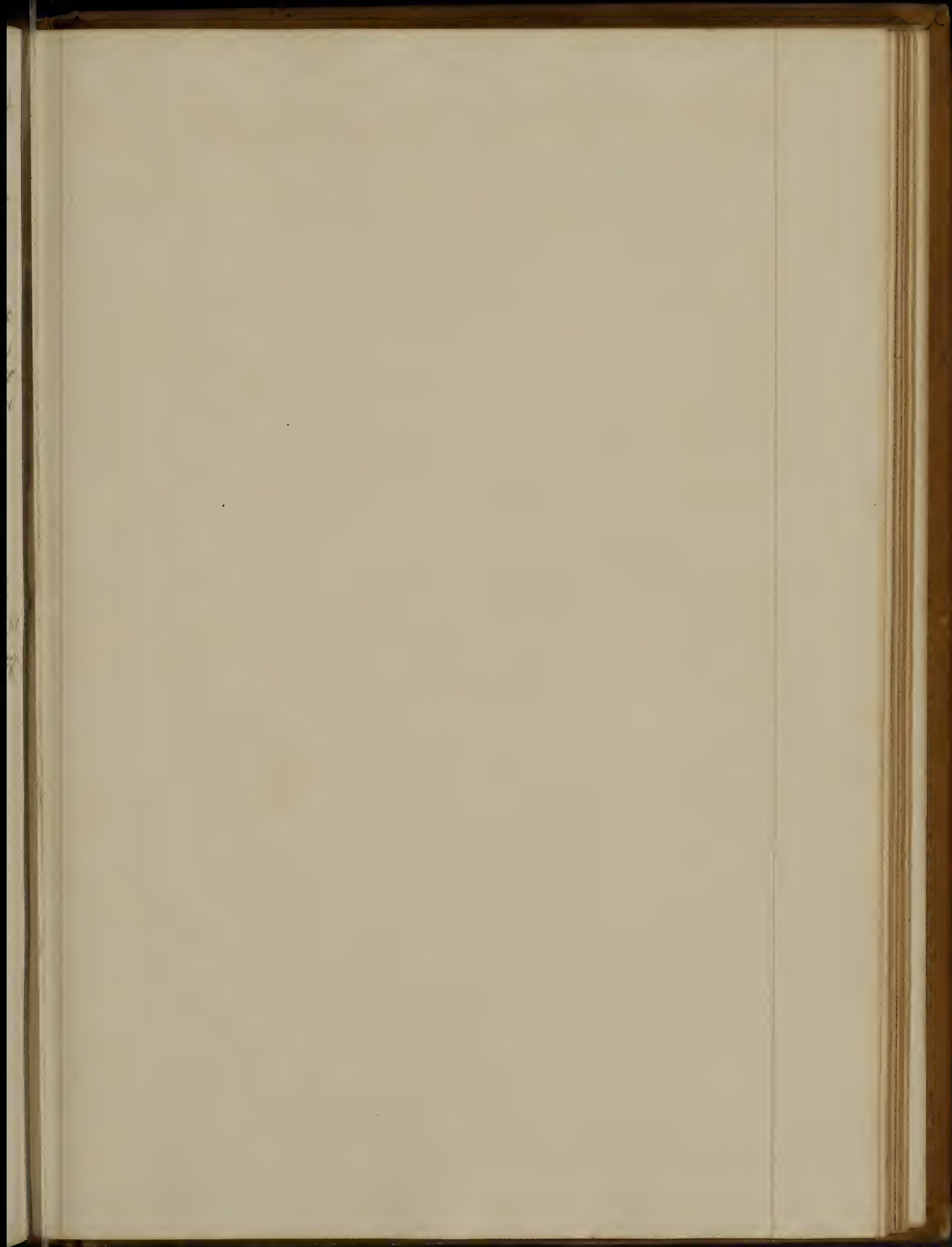
So if such witness is about to leave the
country & if at a time of the trial, the
witness has left the country, or is out of it.

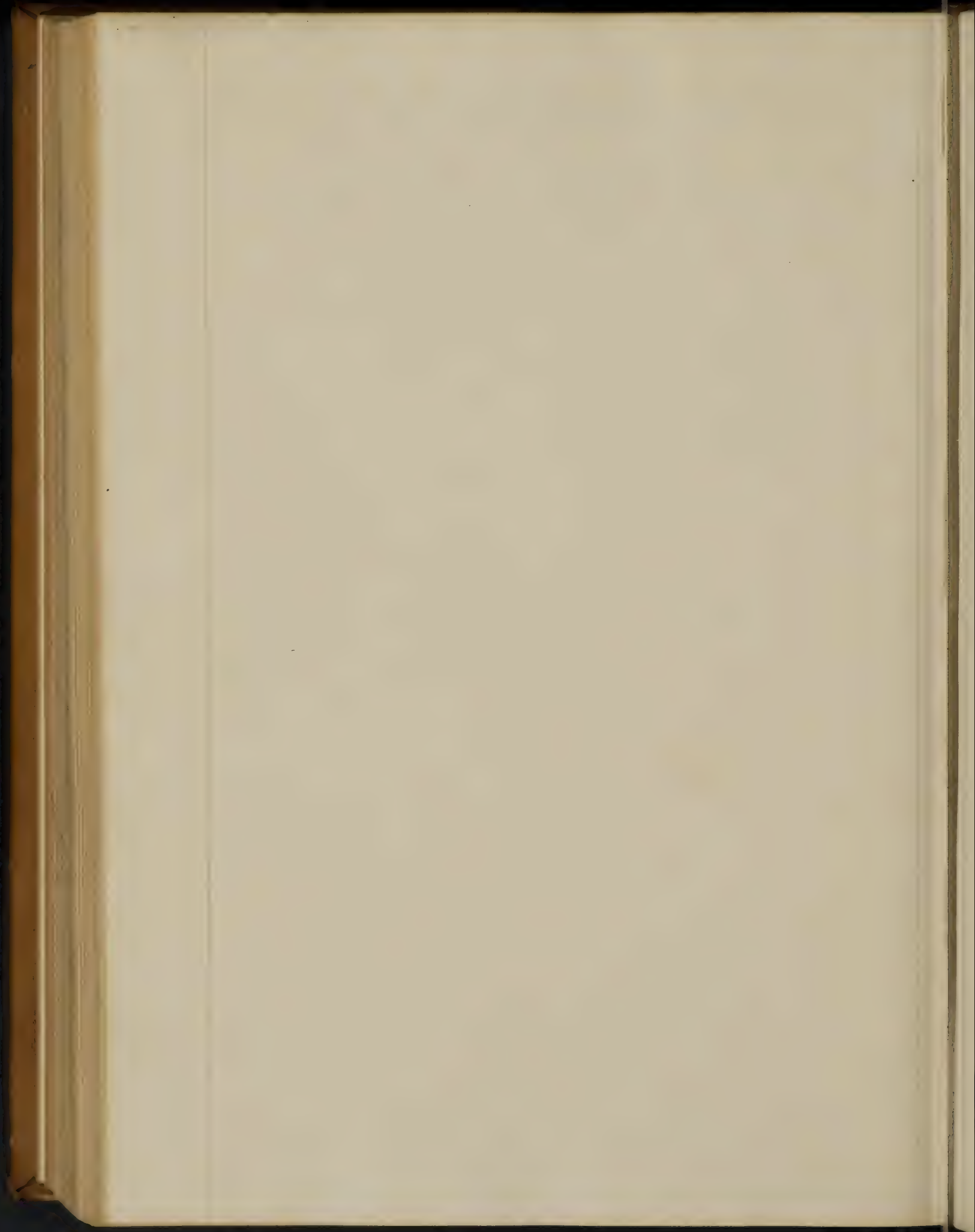
the deposition so taken may be read in evidence.
Phil. 272. Salk. 872. 1. 625b. 12. 1 John. cap. 103. 47.

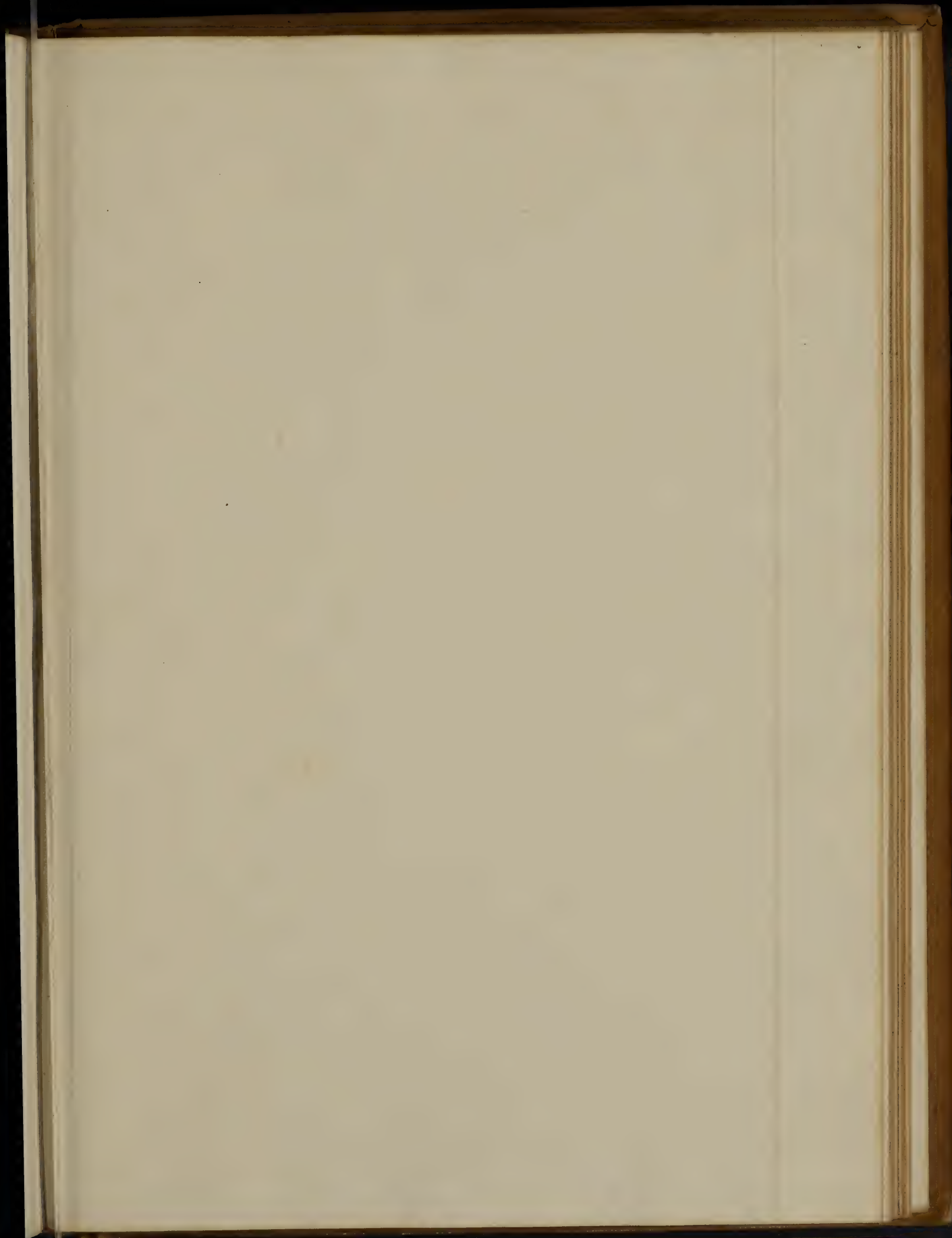
views if he is in the country at the time
of trial. Phil. 172.

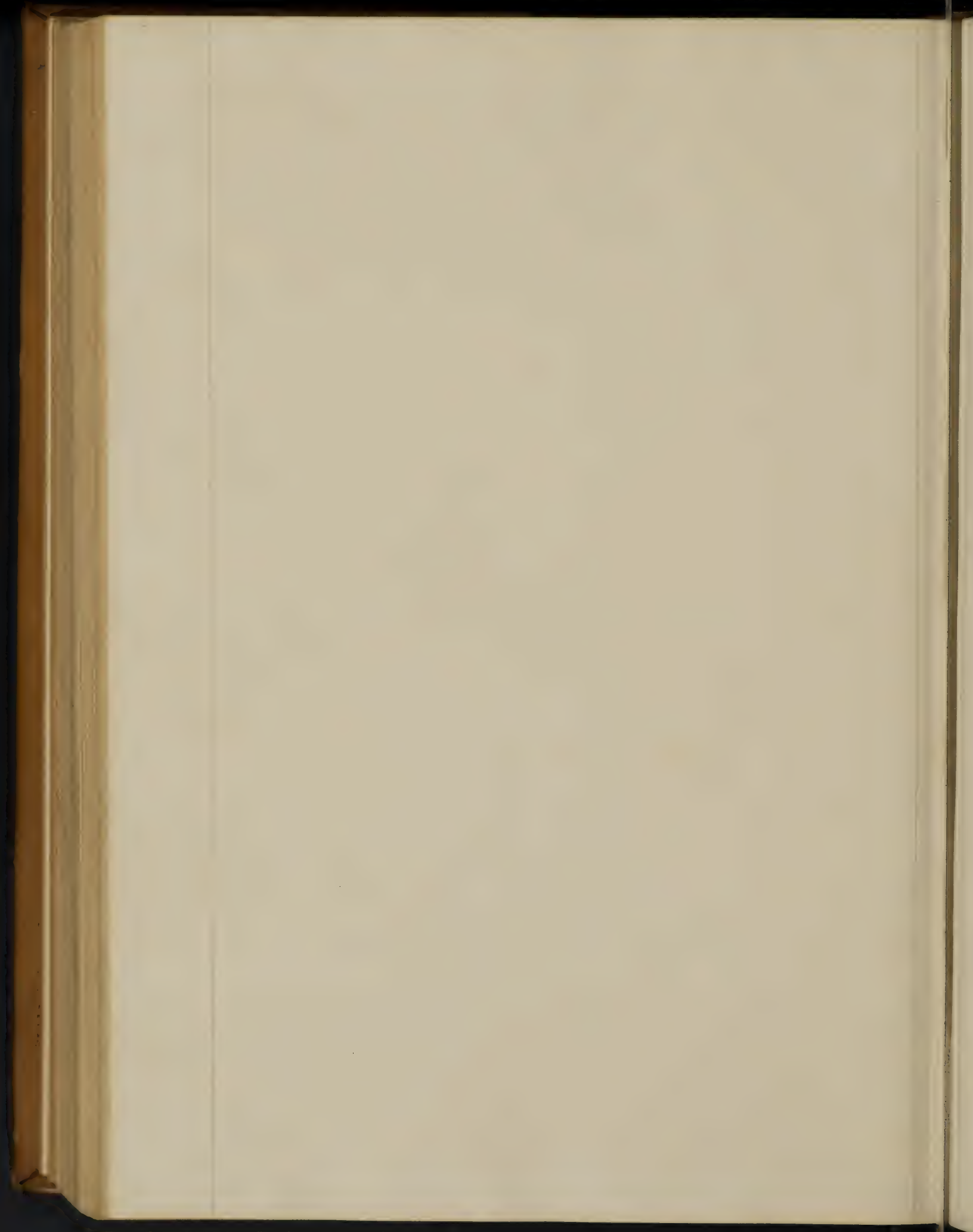
If the opposite party will not consent
to an examination, the Ct. will put off
trial - that a party may file a bill
in Eq. Ct. before mentioned till consent
is obtained or the witness comes into the
country. Phil. 10. Doug. 419. Cowp. 174.
1 Bosanquet & Pull. 211.

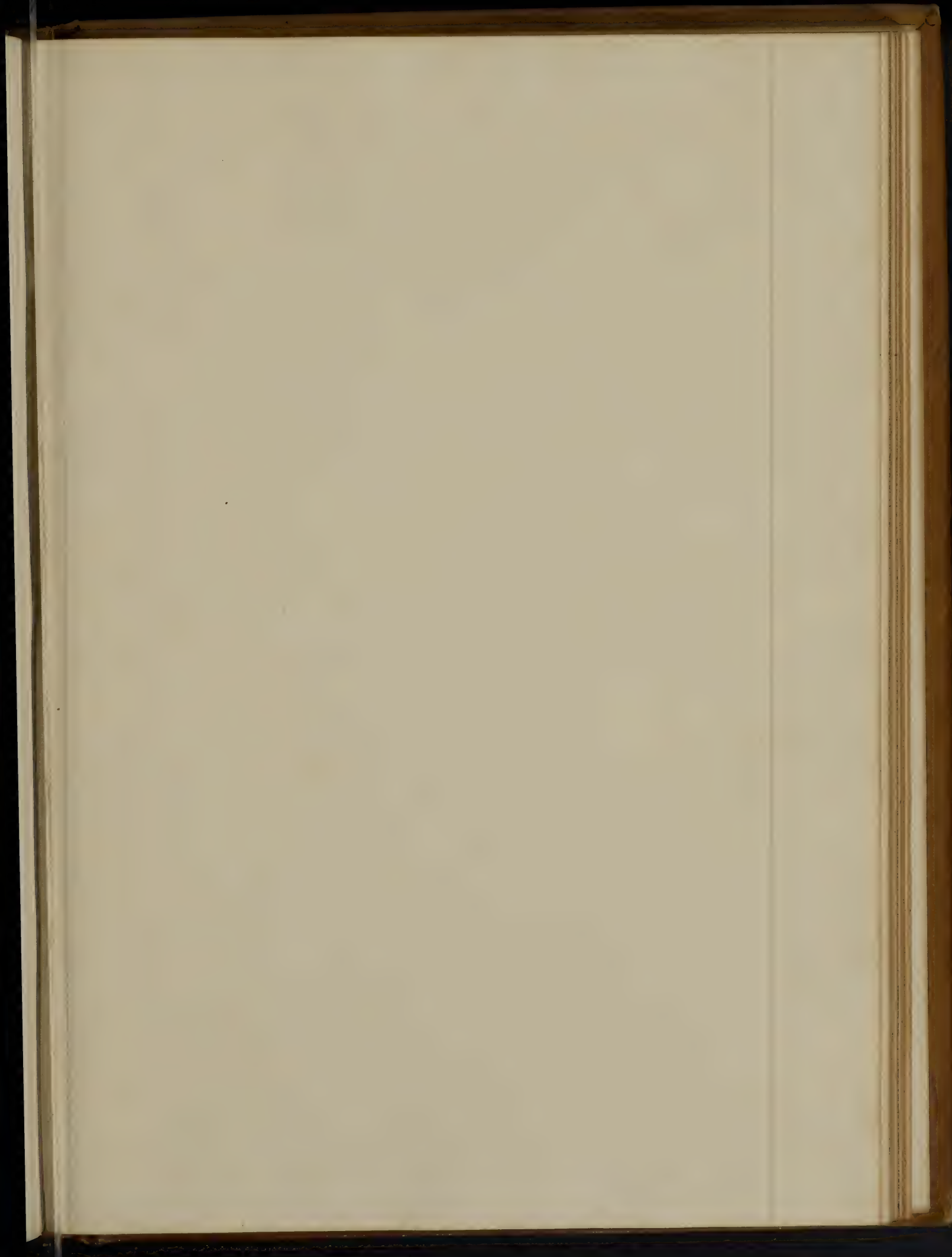
But this will not be done to enable the
party to set up an evasive defence - as if
the witness is his slave - or an alien enemy.
Phil. 11. 12. R. 454.

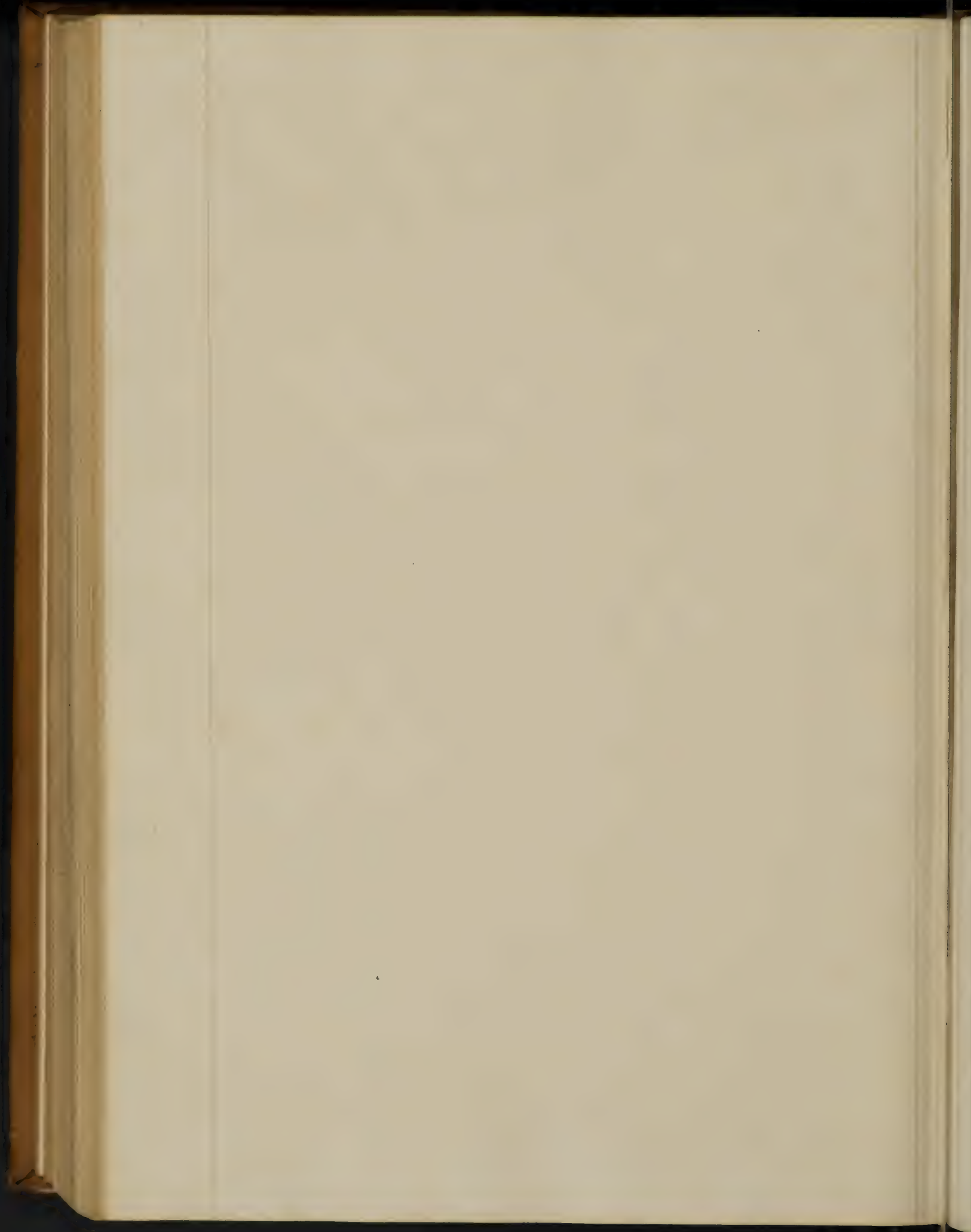


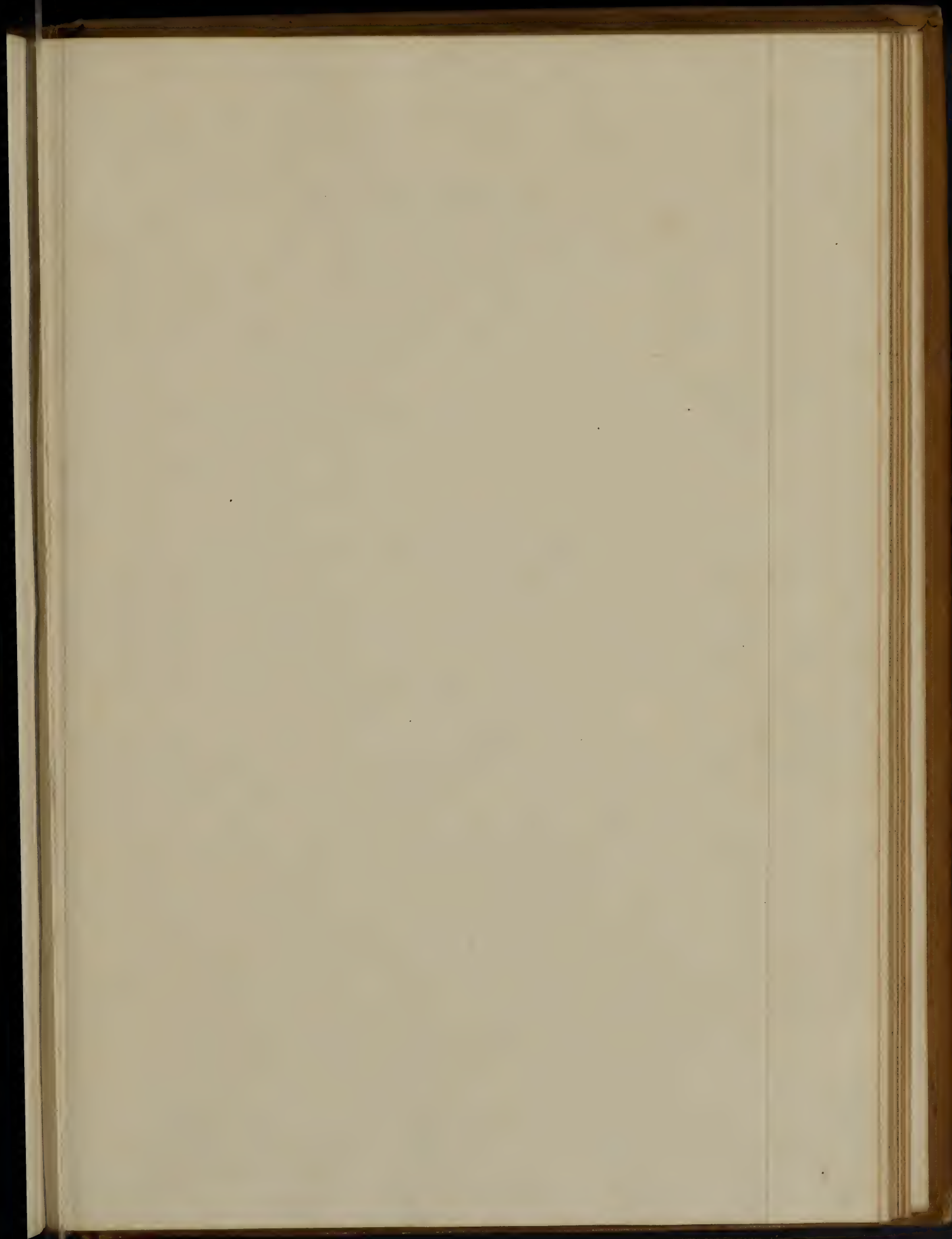


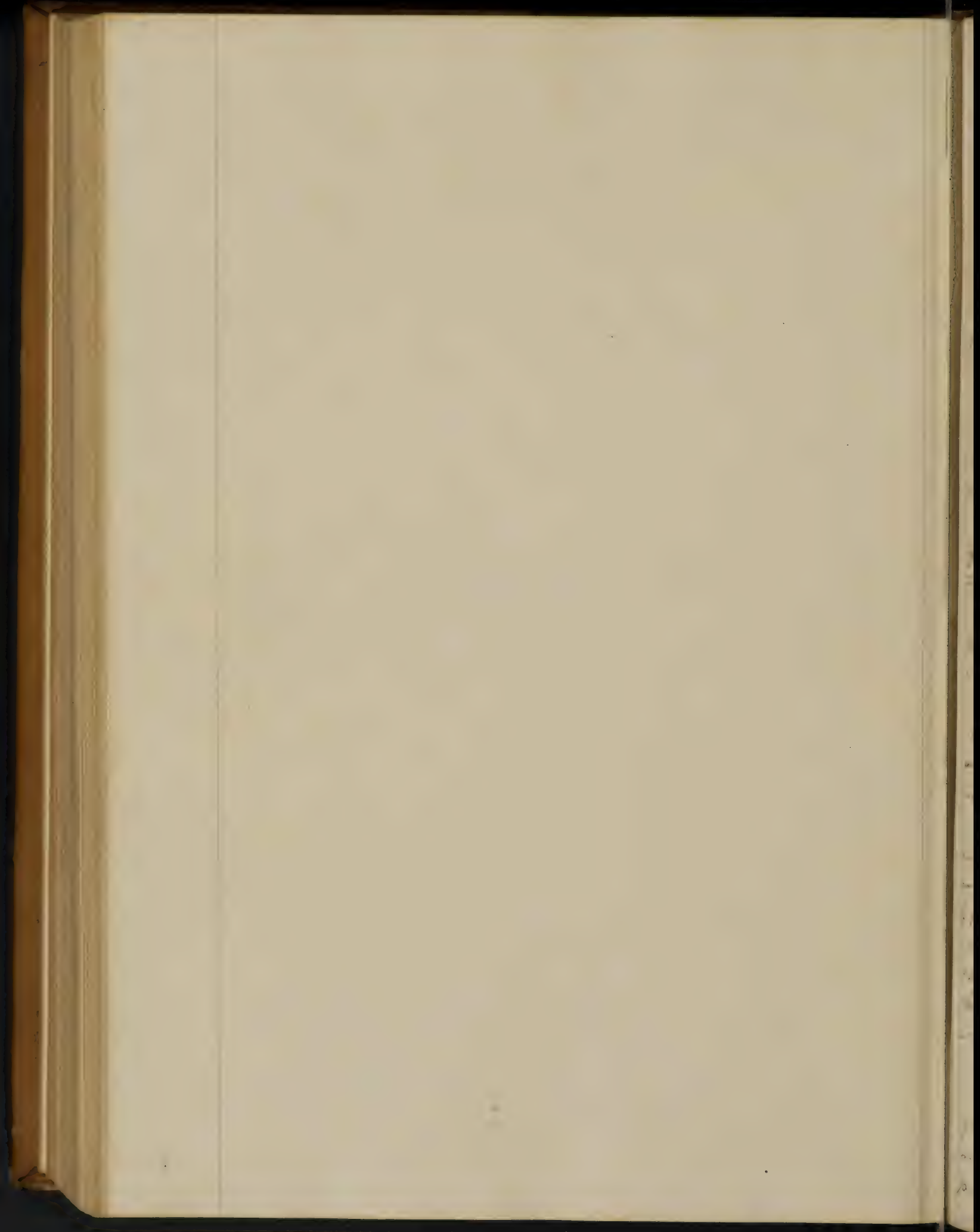












Sheriff & jailer.

Nature of office - manner of appointment:

The word "Shff." signifies a Governor or keeper of a prison or county - derived from, Thax or Thire & Thire

1 Blk. 338. 343. 42 Acc. 430

The mode of appointing him is diff. in ^{the} States.

In mode in Eng. see 1 Blk. 340. 1.

By electors or voters of county in some; by executive with senate in others.

In some he is appointed by the Legislature for a period of three years. & in N.H. by the Legislature for 1 year.

Every Shff. must reside in the Co. for which he is appointed, for he has no original jurisdiction out of his own Co. or bailiwick.

For he is a Co. officer.

But if it becomes necessary for completing an official act begun in his own Co. he may go into another.

Ex. A Shff. in the Co. of Litchfield goes into Hartford Co. to take a prisoner to him Ct. when commanded by Habeas Corpus, & maintains the peace of the prisoner until he delivers him into Ct. in that Co.

So too if a prisoner under lawful arrest escapes into any Co. the Shff. has a right to pursue & take him. This is in furtherance of his local authority. Plowd. 37.

2. Acc. abt. 12. 1.

A Shff. may in some instances perform certain process, even after his office has expired.

The execution of legal process is one individual act, & ultimate consummating act has reference to its inception. 4 Bac. abn. Mf. i. 1. R. 1. 835.9.

4 Bac. 846. Walk. 325. Cro. L. 557.

The same here in regard to constables.
A constable has a same power in a town
here as a Shff. as in 3rd thin ltr.

A Shff. may ^{not} appoint deputies who are
his representatives or substitutes, who may
discharge his ministerial duties, but
not his judicial. R. 1. 13.

Bac. Mf. h. 1

The deputy is removable at C. L. at
a high Shff's pleasure.

But while permitted to remain in
office his genl. duties can't be abridged.

Walk. 95. Bac. 170. Mf. h. 13.

R. 1. 13.

3.

In sup. 3 under Shff. acts officially, & in
his name & in Shff's & never in his own
name. for he is considered a sort of
3 Shff. & a writ is directed not to him
but to 3 Shff. & 3 return or process is
made in 3 name & 3 Shff. & not in 3
3 deputy, even tho' 3 deputy makes
a process. See "False Imprisonment".

Coop. 25. Walk. 96.

Bac. ab. Shff. h. 1

In some cases process is directed to 3 constable

In ltr. 3 deputy acts in his own
name, & is considered a public officer,
& the direction is to 3 Shff. his deputy or

any of 3 constables of So. town.

R. i. g. 237.

A covenant by a Deputy not to execute, pro-
cess of a certain description is void as be-
ing vs. law, because it is a contr. to the
is his duty to do.

Cont. 35. Bac. Shp. h. 2. Hist. 14.

A Deputy can't delegate his authority
to another, for 3 party empowers can
never delegate his power to others.

Bac. Shp. h. 4.

But he may empower some other person
as an assistant.

4 Bac. 592.

Roll. 90.

If a Shff. directs his warrant to two persons,
either of them alone may ~~may~~ execute or make
3 arrest. because 3 authority is of a public
lie nature. Cont. 101. 3 tra. 114. Bac. Shp. h. 4.

But where authority of a private nature
is given to two persons it must be execu-
ted by both.

4 Bac. "rescue" 12.

Where a Deputy is guilty of a mere neg-
lect of duty, as to a negligent escape
3 Shff. may have an action on 3 case
vs. him, & may sue immediately for
3 Shff. is himself liable.

"Civ. 114." 1 Roll. 98. Bac. Shp. h. 4.

It must be very rare that 3 Shff. brings an ac-
tion on an implied cont.; for there is usually
a bond or cont. between them. The usual remedy
then is, an action on 3 bond or cont.

4. The gaoler of a com. prison in each Co. is a
substitute for a sheriff.
The sheriff is ex officio keeper of a com. prison in
his own Co. 4 Co. 34. 4 Co. 119.
1 Bac. 473.

The sheriff has no right to confine his pris-
oners in any other place except a com. jail
or from some stat. provision.

And if he confines them elsewhere he is
guilty of false imprisonment. 3 Bac. 19.
1 Hall. 408. 18 Id. 318. 40 Ct. 202. Latch 16.
"False imprisonment."

And if there is no other jail in his Co. of
the kind he is not liable he ^{if he} can't be im-
prisoned, or confined in his own Co. in
any civil case. 11 Id. 48.

If there is another jail he may be con-
fined, in that jail.

In Eng. they sometimes have two jails in a same Co.

3 Leon. 379. Latch 16. 14 Mod. 198.

If it is concluded that a sheriff is indicted
he may be imprisoned (i.e. in a crim. case)
in a jail of some other Co.

In N. Y. it was held by Sup. Ct. that a sheriff
may be confined in a "ce. ga." in civil suit,
except he is imprisoned in a common or own
working house. This is a novel case,
and I conceive not law.

When there is no jail in a Co. a sheriff may
imprison and detain at his sleeping place a jail

for he has authority to provide a good, G. Johnson. &c.
In Eng. a Shff. may be arrested on mesne
process in a civil case, for if not liable to im-
prisonment he may be discharged on com. bail, wh.
holds him to trial.

G. Johnson. 24.

In Cont. com. or petitions writ is unknown,
e.g. a Shff. can't be arrested here on mesne
process.

Shff. liable for acts & defaults
of his Deputies.

as to Defaults is but a secret. &c. &c.
latter is liable for acts & defaults
of his Deputy. "Qui facit per alium" &c.

5 Co. 89. 2 Inst. 119. 9 Co. 98.

2 Lev. 158. 1 Kent. 314.

The Shff. is liable for acts & defaults
of his Depts. when in law they are considered
as Shff.'s. acts &c.

When a Shff. is thus liable he is allo-
wed to take security from his Depts., to
indemnify himself for their acts & defaults. 5.
4 Benc. 441.

The Genl. Rule is that,

The official acts of his Depts. are to all civil
purposes acts of Shff. & he is liable civilly.

But a Shff. is not liable criminally.
for then he must have personally guilty
of offence.

2 H. 2d. 1576. Long. 42.

2 Inst. 157. Lat. 11.

W. 1. 330 Inst. 11.

But 3 Shff. is not liable for his duties
private tools only for those done offic-
ially.

Bro. Elie. 117. 115

Roll. 93. 13ac. 442.

Hence if 3 dep. levy an exccⁿ vs. 34.
or 7 goods of B. (is mistake if you please)
it may even be doubted whether 3 Shff. is lia-
ble, because 3 can't act under
a sup^r's authority.

But it is now settled that he is liable,
as 3 dep. is deemed to act officially,
tho' initially.

3 Hils. 50. 13ac. 442.

236 R. 812. 13ac. 442.

and where 3 dep. commits a trespass on
ch. 3 Shff. is liable, 3 dep. is lia-
ble in action of "Trespass". Right
from 3 analogous case of "Hart. & vint.
41.2.

for 3 Shff. & all his substitutes are in
now considered but one.

Darg. 72. 236 R. 812

2 Hils. 552. 914. 27.

For 3 dep's neglect in official duty, 3
Shff. only or C. L. is liable.

Ex. 26 7 dep. suffer a negligent exccⁿ

40. 583 13ac. 442. 6.

136 R. 18. 5 13ac. 442.

For 3 under Shff. is not a known public
officer & process is never directed to him

6. But for a position but on my personal

committed by a dep. in his official capacity
by dep. as well as by Sheriff is liable.

Co. J. 130.

Salk. 18. Esp. 603. Co. E. 175. 767.

Where wrong consists in omission of duty or
negative tort Sheriff alone is liable, but
where tort is positive both are liable.

A voluntary escape by dep. is a positive
tort.

The Sheriff has power of appointing Special
deps. for any particular purpose or
for a single occasion.

But his liability for him is not the
same as for his genl. dep. 4 T.R. 120.

If a Sheriff special is appointed by Sheriff
by nomination of J. P. Sheriff is not
liable to J. P. for his acts.

esp. 607.

In Con't. a Sheriff's dep. is liable for neg-
lect of duty as well as for tort.
If here he is a known public officer
in fact they are both liable for any
wrong.

The rules of a Sheriff's deputy apply alike
to a Sheriff's gaoler.

The gaoler derives his authority from
Sheriff.

The death of a Sheriff is a revocation
of all his deputies' authority. Ergo, his gaoler's
authority ceases ipso facto as does that of all his deputies.

4 Bac. 445. 3 Co. 72. Co. E. 366. 19 Mod. 14.

9. After death of a Sheriff & before as there
is appointed a new one, prisoners escape no one
is liable.

Reception or appointment of a prisoner is
a well remedy.

1, Nov. 14, 1848.

But a Sheriff's death & jailer has no power
to discharge & prisoners any more than to
detain them, his power over them is the same
& no more than any stranger.

7. Sheriff's authority & duty.

By C. L. & Sheriff is a judicial as well
as an executive & ministerial officer.

12th. 342. & Dec. 448. S.

In cont. he is a ministerial & executive officer only.

A judicial officer is one who hears & decides
in judges,

A ministerial officer is one who executes, or
in obedience to & command of any superior
officer or authority.

An executive, is one who obeys & law but
not any superior officer.

ex. Pres. U. S. & Gov-
ernors of our States & our Secretaries so
far as they act in obedience to laws.

The Shff. of each Co. is conservator of
peace of that Co. & is the first execu-
tive officer of the Co.

1 Bl. 343. 12 Bl. 237.

1. As Conservator of peace.

In this character he may apprehend all
who break the peace.

He is also bound to arrest murderers, felons
&c. & to commit them for trial,

and is to defend the Co. vs. all rioters &c.
& for this purpose may command the
jury committee to assist him, i.e. all
persons of sufft. age & ability.

1 Mac. 450. 453. 1 Bl. 343.

Co. Lit. 158.

2. As a Ministerial Officer.

As a ministerial officer, he is bound to ex-
ecute all lawful process directed to him
& on his refusal, is subject at C.L. to fine and
imprisonment & to a civil action on any case by the party aggrieved.

Blond. 24. 1 Bl. 344. 1 Mac. 453.

In Cont. a Shff. is liable in "action on the
case" for not returning a writ.

In Eng. he is ruled to return it, & on neglect provided vs.
by attachment as for contempt, 12 Bl. 252. 3.

1 Mac. 38. 206. 2 Bl. 251. 252. 116.

The Shff. or his dep. may command, & assist
the Co. when resisted in the execution of lawful
process.

4 Mac. 453.

in Court. he can do & same in conjunction
with a justice of peace & may even
command & militia of & Co.

A ship. can't lawfully break an outer
door or window in executing civil process,
in some cases dwelling house is his cas-
tle.
Sec. 91. Corp. 1 Bro. 512. 909.
Hott. 62. Esp. 604.

It is said in some books if a ship. breaks
a door &c. to obtain & remove a goods.
it is not good the & ship. was liable.
Co.

J. F. thinks & whole void.

but in Eng. in such case, more & otherwise
is discharged on one motion.

Eng. & execution is void.

Corp. 1 2036. 822.

4036. 288.

In Burglary a man lifting a latch is
considered a breaking. but J. F. thinks
the custom & law is not so strict in regard
to a ship.

This privilege extends to outer doors & windows
i.e. privilege of castle.

If he can enter peaceably & if necessary he can
break, after first demanding, break an
inner door a fastening.

Corp. 2.7

Esp. 604.5. Hott. 62. 263.

Comm. 17. 327.

The privilege of outer doors &c. protects none
other than those resident there. goods &c.
on a ship. if admittance is refused, can

break & house of A. to take W. or his goods.

5 Co. 93. b. 1 Sid. 186.

4 Dac. 455.

In case of criminal process this privilege of castle is not allowed at all.

If a Sheriff requests peaceable admittance & is refused, he may break enter doors if necessary.

5 Co. 91. 4 Dac. 455.

In process to compel one to find sureties & since the rule is the same, breach & proceeding is of a criminal nature. 12 Co. 131. 4 Dac. 454.

The rule is the same in case of process of forcible entry & detainer.

4 Dac. 455.

It is also where one having actually committed a felony, & Sheriff with or without process if necessary, can break & house & take him.

But if one is merely suspected of a felony & Sheriff summons &c. without warrant he does it at his peril & is justified or not by event.

2 Inst. 139.

4 Dac. 455.

It is also one may enter a house with a warrant ~~there~~ suppress an affray.

So an officer has a right, on fresh suit to break a house &c.

1 Root. 86. 4 Dac. 456.

There is a single instance in which an officer can enter a house if necessary, on a civil suit. Ex. on a writ of "habere facias possessionem" 4 Co. 91. b. 4. 2a. 455.

A room or out-house or store not adjoining
a dwelling can be broken open if needed,
in a civil suit. 1 Stat. 1867, Ch. 61, 698.

A half (having entered) - In a ...
 having ... a house & is ...
 I in them ... break & release

again, this privilege is not to be exercised
except on an original receipt only.

that is a person escaping from the
custody, "left my" break in house &
back in. , Box - 556. O'Brien 5's.

But if a person illegally accepted by a
breaching of his laws on a civil suit is
again arrested while under first arrest
a second arrest is good if there is no col-
lusion.

2 D.R. 823. Exp, 605

at age 7 months

3. It is the duty of the civil
magistrate to execute on the law, &
if officers making such arrests is guilty
of false imprisonment.

Q. R. 73. Dec. 45.

In Cont. it has been determined that 7
seconds of day light is only time on the
an except cannot be made.

This extends only to criminal arrest & if once having escaped, a prisoner, can be again taken even on Sunday.

Nov. 25. 2.53.

a person arrested on Sunday in civil process can be discharged discretionary or motion for it, or on summary process.

5 Mo. 51 Cdo. 95.

5 Mac. 356.

Of Escape.

The doctrine of arrest is intimately connected with the law of escape.

An escape is an unlawful evasion of legal restraint or custody.

2 Bac. 225.

Whenever a person is thus restrained of his liberty, such restraint without the consent of law is for to escape.

It is essential to an escape that there be legal arrest, & that it be in cases from false imprisonment. to sh. he wd. have a right.

Esps. 607. 5. Corp. 68.

Of Arrest.

A person arrested to be lawful, must be made in pursuance of lawful authority & must be made.

4 Bac. 455. 6

But an original arrest without warrant in a civil case can't be made.

When an arrest is made where a warrant is necessary, & Rule 4,

1st 7 Ct. by whose jurisdiction & authority has jurisdiction of the subject-matter.

An arrest made under this process is legal.

This rule supposes a process legal.

also & 3 made legal. 2nd 333. 334. 338.

2nd 303. 5th 41.

2nd 334. 2nd 334. 141. 6.

2. If a writ. move in jurisdiction of a cause
of action or subject-matter, & arrest made
under it process is universally illegal
& void. 16 Auct. & 2 B. & C. 100. & 101. & 102.
In this rule there is no exception.

When an arrest is made on mesne process
is going at large if no escape, provided
a deft. appear in Ct. on appearance day
or on 1st day puts in bail above.

50 Bk. 230.

This rule presupposes a writ issuing to be
regular.

For where there is sufficient time it must
be returnable at a first term, & as it
is irregular.

5 Wils. 231. Exp. 808. 8. 348.

Barth. 148. 10 Bk. 475. Bro. 148.

An irregular writ is no writ.

The terms of a writ. rule first laid down above
will not meet the exigencies of our law.

So in Court. mesne process does not issue
always from a same Ct. to which it is
returnable.

When it does issue from a same Ct. to which
it is returnable a distinction is, same
rule as in Court.

If a process is issued by competent au-
thority & is made returnable to a Ct.
having cognizance &c. & arrest is good.
Secus void.

§ 44 C. L. an Officer having made an arrest
on final process can't permit, prisoner to go at
large, or delegate his authority to another to detain
prisoner in his absence. 1 Wob. & Cal. 24.

There can be no escape in L. unless there has
been an arrest actually made.

There must be an actual touching
of person to person, or submission on part
of person to person.

Ball. 64. Park. 78, 586.

Exp. 604.

This formality is not universally necessary.
If a person is arrested & while in custody
is again arrested on another suit, he is
in violation of law under arrest on both suits.

Ball. 237. 2 Wob. 236.

If a person escapes at all, there are two es-
capes & a Sheriff is liable for both.

3. An arrest shall be regularly i.e. legally
made, & if it be not, there can be no escape.

In all civil ^{cases} arrest must be made under
authority of some legal writ or warrant,
except where lawful.

Wob. 54. Wob. escape, 22.

Exp. 604.

The arrest must be made by authority of
an officer to whom a writ is directed.
i.e. either by himself or he must be in
company with a assistant or follower.

He need not be actually in his pres-
ence but it is suff. if he is near and
in pursuit of same object.

Wob. 63. 5 Wob. 211.

Exp. 604.

Under this rule, it follows that an arrest by breaking outer doors or windows is not regular, & under it can be no escape. So if an officer arrest illegally on ground he is not guilty of an escape, if he releases prisoner.

Bac.

5 Nov. 35. Wash. 78.

Exp. 104.5 Co. V. 9.

If a ship. have an opportunity to take a deft. & refuses to take him & he is not finally arrested, the ship. is not liable in case of neglect of duty.

70 Nov. 12 51.

An officer having publ. authority is not ~~to~~ show a warrant to a deft. before he serves it, even if demanded.

But after arrest made he is bound to show it, & read it if necessary. 40.5 385
Exp. 84. 82 R. 187, 9 Co. 69, Bac. 10. n. 1.

But a person exercising only a special authority, as a special deputy, &c. must, if required, show a warrant before he serves it.

Because he is not known as a public officer but is a special one.

Bac. 10. n. 1. 9 Co. 69.

Escapes in L. are of two kinds,
Voluntary & Negligent, 136.

14 voluntary escape takes place by consent of a officer or person having custody of prisoner, & negligent, without this consent.

The former is a positive trick or actual misfeasance,
the latter is a mere neglect or non-feasance.

The principle upon which a Sheriff is made liable is,
That every person committed to prison
is to be kept in safe & close custody.

He who is within the limits is deemed
to be in close custody.

If a Sheriff or gaoler ^{voluntarily} permit a prisoner,
even for a moment, to go within the limits,
he is guilty of an escape voluntary.

Bac. escape. 6. 11.
2^d Lord. 16.

If a Sheriff or gaoler admits to bail a
person not by L. bailable, & prisoner
is guilty of a voluntary escape.

And if a Sheriff or gaoler permit a prisoner
to go at large, even with a recogni-
er, & only for a moment, he is guilty of
^{voluntary} ~~negligent~~ escape. 3 Co. 44. Bac. Ec. B. 1. Roll. 806.

2^d Lord. 16.

If a person accepted on final process is
permitted to go at large at all, a Sheriff
is guilty of voluntary escape. 2^d R. 126. Post 19. 29.

10th & 11th 26.

A prisoner committed on criminal process
must be confined within the walls of the
prison.

But one committed on civil process, on
giving security to leave the Sheriff's main-
leff &c. is entitled to the benefit of the limits.
He is a part of the prison to those entitled, to others not.

2^d R. 126. 31.

See a case in 1 Wing. 13. & Wing. ab. escape
to. 2 & 1. Bull. ni. 11. 22. Prost 72 (written)
not law. 1. 1.

If an officer ordered to bring up a prisoner on "Habeas Corpus"
grants a prisoner any unreasonable liberty
if he is guilty of a voluntary escape
ex. & Shiff. takes a prisoner 60 miles out of 3 way.
If in bringing him on a writ of Habeas
Corpus he must bring him in a con-
venient time, & in a convenient way.
Id. 100. 788. 201. 6 1100. 78
bro. 14. 8 100. 305. Dec. Dec. 11. 22.

If an officer having made an arrest
on final process must commit & pris-
oner in suitable time, since he is
guilty of voluntary escape, in final process
is a coercive means for obtaining (1 B. & P. 24. 2 J. R. 156.)
satisfaction.

But on mesne process he is not obliged
to commit, as soon as may be, after arrest.

Arrest on mesne process is intended as a means
of holding & party to trial only.

When an arrest on final process, & Shiff.
he has no right to discharge & pris-
oner, if a full amount of execution is
paid him, if so he is guilty of a vol-
untary escape. bro. 10. 404. 1 100. 633. 8 100. 225. 100.
Dec. ab. escape. he.

Because & Shiff. is not & Shiff. is atty.

But in last & not "ca. sa." authorized & Shiff. to col-
lect & money.

If on a "ca. sa." & Shff. having arrested
discharged & left. on his paying & is presented for an
escape, before & Shff. accepts & money, he is liable.

But if & Shff. receive & money he waives his right
to sue. 19 Nov. 214. 14 Sept 4, 8. Ld. R. 188.

If a Shff. marries a female committed
on execution, he is guilty of a voluntary
escape. (bravo.)

For a man can't be his wife's gaoler

3 Jac. escape b. 3.

If & Shff. arraigns one of his prisoners
a town-keep & she is guilty of a volun-
tary escape as to get Prisoner.

Harbor. 311. Feb. 808.

If a prisoner having & liberty of & limits
shows a disposition to escape as by
having once transgressed it is & Shff's
duty to confine him.

2 J.R. 131.

But if a person having such liberty
escapes witht. manifesting such a dis-
position before, such escape is neglig-
ent

2 J.R. 131. 1 Post. 127. 8.

The Shff. is not bound at C. L. to admit
any prisoner to & liberty of & yard, even
if indemnified, for it is discretionary
with & Shff.

2 J.R. 131.

After he has admitted him to & liberties
he may recommit him to & walls if
he pleases witht. assigning cause.

In last, he must give him
indemnity in civil cases if indemnified.

Of negligent escape.

If a person lawfully arrested evades his restraint by fleeing from a officer or using force, & escape is negligent.

So where a prisoner committed to a walls breaks out.

It is in any case where a officer is not aiding or consenting, it is a negligent escape. Bro. J. 418.

2 Bl. 416

Fitzh. 130

- 19 But there is a material diff. in escapes on mere & final process, & also in consequences. (Tit. Exec. 9) Esp. 605. 6. 2 Bl. 415.

If a person arrested on final process tho not committed, is permitted to go at large, tho but for a moment, a officer is guilty of an escape.

And if a person so arrested (committed or not) is enlarged on security given, & it may be again committed, & rule is the same, & such security is void, for a arrest is a coercive remedy, wh. a law will not allow to be relaxed by a Whiff.

The security is given to effect an illegal act. (ib. aucts.)

A person arrested on mere process, may before actual commitment, be suffered to go at large, provided he is forthcoming on the appearance day. 3 T. R. 172. 5 T. R. 37.

(Tit. 209. 382. 432. more liberal rule in Cont.) Halk. 408. 2 W. R. 295.

The only object in this case is to compel the attendance of a Det. & not to obtain satisfaction of a Det., for there is none ascertained.

But if a person allowed to go at large, on
mere process, does not appear on 3 day,
nor put in bail above ^{original} 3 enlargement
by 3 Jthp. becomes an escape, & 3 Jthp.
is liable. Bro. Co. 623. 52. 863. Bac. "escape" 2.

2 Wils. 294. Esp. 609.

And 3 escape in this case is negligent, for
3 enlargement was not at 3 time unlawful,
& as it is 3 non-appearance of 3 deft. wh.
makes it unlawful, & consequently an es-
cape, & as 3 non-appearance was not con-
sented to by 3 Jthp. 3 escape cannot
be voluntary.

If a person arrested on mere process is ac-
tually committed; & afterwards permitting him to
go at large even for a moment, it is an es-
cape; for after 3 opportunity of procuring bail is lost forever.

1 Roll. 807. Esp. 601. Falk. 271. 2 Wils. 294.

(After commitment must be as above.)

(1 Roll 607. Esp. 601. Falk. 271)

And if 3 Jthp. in this case proceeds to arrest
& detains it vs him he may still, versus
3 Jthp. for 3 escape, for there is always a special dam-
age sustained by 3 escape. 2 Wils. 294.

By Stat. Cant. a person committed on mere
process, a prisoner may be permitted to go at large on a bail-
bond, to 3 Jthp. to indemnify him.

There is in Eng. a similar Stat. 23. Hen 6. 20.

If one arrested on mere process escapes,
3 Jthp's remedy vs. 3 Jthp. is an action on
3 case. For 3 damages are presumption.
And 3 action can't be supported in 3 Jthp.
proves a legal claim vs. 3 party escaping. Esp. 609.

2 Lev. 85. 1 Sta. 873. 2 Wils. 295. 1 J. 29. 440. 8 W. 520. 4

It has been determined in *St. Ry. v. Atty.* in
this case can recover no more than debt wh. existed
vs. original deft. 1 Johns. 215.

But in an escape & *Atty.* may either
have an "action on a case" or "by Stat."
West. 22 & 1 Richard. 1st an "action on debt"
2 H. Bl. 110. 113. 2 I. R. 129, 132.
I. R. 153. 256. 203.

and these two Stats. extend as well to es-
capes before as after commitment.

ib. acut.

If an "action on a case" is brought & jury are
to give what damages they please, for the
action is not but to recover debt due (2 I. R. 129. Esp. 609) from a deft.
on original suit, but for damages sustained by escape wh. is merely presumptive.

But if, in an "action on a case" it is agreed
to give special damages, ^{to a less amount than just.} & *Atty.* may
pursue his remedy & obtain his whole just
debt from a party escaping.

Ball. 57. 611. 2 I. R. 129. 2 Wils. 291.

But suppose a jury give a special damages &
full amt. of debt, can a *Plff.* then pursue it? Wooted.
2 I. R. 129. 5 I. R. 401. Oak. R. 124. 8 K. ex. 172. 3 Esp. R. 208.

If a *Plff.* brings "debt" vs. a *Def.* & jury must
give a whole ~~original~~ debt, for wh. original
debt was changed, as damages, in an action is not for precise
sum wh. was due.

2 Bl. R. 1048. Esp. 609. The effect of

bringing this action is to transfer whole debt in solidum to a *Plff.*
and it is fully settled &c

If a person arrested on ^{mere process} is rescued ^{on} before conviction, & D^{ft} is excused by ^{the} rescue, & a return of a rescue is a good defence to action for an escape.

But if one arrested on final process is rescued, & D^{ft} is not excused by a rescue.

The rescue is no bar. 180. 201.

"D^{ft}" a cas. 10.11 Bro. J. 418. 3 Bl. 415. Cro. & 87 J.

But after a D^{ft} arrested ^{even on mere process}, a rescue is no excuse for D^{ft} in ^{more} by public enemies, for according to the law of 3 C. 2. no power is considered greater than that of D^{ft} except that of public enemies.

Where a rescue was after conviction, & escape on mere & final process is, same

Roll 808. Cro. 84. 1 Cro. 582.

esp. 600.

But if D^{ft} in 3 process may maintain his action wth a rescuer whether on process mere or final.

Hob. 18. Cro. Car. 109.

Bro. J. 486.

Hutton 98.

Wherever D^{ft} is liable for a rescue 3 D^{ft} has his election whether to sue a rescuer or D^{ft}. But by suing a rescuer he waives his suit wth D^{ft}, tho' I find no decided case. (J. G.)

6 Mod. 211. Hutton 58.

(It is at least correct on principle.) 1 exp. 657. Cro. Car. 77. or 109.

And it is so, & that D^{ft} when he sues a rescuer may have either "Profrap" or "Indigo" on case.

Hob. 18. Cro. J. 525. 3 Cro. 399.

For damage sustained by D^{ft} is consequential & not direct.

Engo, how can he have "Profrap".

22. In action vs. recoverers, & jury are at lib-
erty to give what damages they please, not
exceeding & demands. 6 Jf. 69. 211. Esp. 687.

If & jury give & p'ty only part of & de-
mand, & p'ty may have his action vs. the
debtor as in a former case. (ante) Esp. 611. Bull. 69.

If an action is brought vs & on mesne pro-
cess, his return is a return is conclusive,
but & p'ty may sue him for a false
return. In such official acts & C.L. will
not suffer to be falsified except by a
proceeding wh. in its nature & necessity in-
volve & directly in issue & wh. is instituted for
that purpose. Com. 255. 222. 225.

Bro. 2. 781. 2 Vent. 175. 40 Bac. 509.

Tho & p'ty may be sued in another action, in wh. & falsity
of & return is alleged as & gravamen.

The p'ty may also have an action vs. & for
arrest, viz. "case" But this J. J. supposes
is only in cases in wh. he is liable even to
p'ty & not in "arrest on mesne process."

He needs no indemnity for (Bro. 109, ^{78. 113} Hutton 98. Holt. 180
he can't be subjected.) 40 Bac. 335.

If & p'ty brings out a prisoner on Habeas
Corpus, & p'ty is no excuse. he ought to
have & power of & county in such case. Esp. 610. 4 Tra. 482.

After a person arrested is actually commit-
ted, even, mesne process, nothing but & act
of, or of public enemies will excuse
& p'ty in case of escape. 4 Co. 84. a. 2 H. Bl. 113. 42 Bl. 782

And it has been held (Esp. 610) & p'ty burning
the prison, or by lightning is no excuse, as in year 1668 when

prisoners of London were turned, & 3 prisoners released, & Shiffs. were held Shiffs. & liable, & an act of Parliament was passed to discharge them. Factor.

There is also an essential diff. between volun- No. 2.
tary & negligent escapes, in their consequences. 23.

It was formerly held, that when a prisoner was voluntarily released, his liability was transferred from the prisoner to the Shiff. Holt. 202. 2 Bac. 209.
This rule is not now law.

As; L. now is, if a Shiff. permit a voluntary escape of a Shiff. may according to a native case on final process have an action of "debt" vs. him, or by "sci. ga." a new exec. on the original judgment. or by Stat. 11 Geo. 4. Mar. obtain a new exec. with a "sci. ga.", or may take him again on Holt. 80. 1 Cl. & F. 332.
2 Bac. 240. 1 Bac. 136. 3 Bl. 415. 2 Holt. 186. 1 Kent. 4
the same exec. on sh. he has been committed.

On the other hand if there is a vol. release on a process & ~~Shiff.~~ ^{Shiff.} may retake him on escape. warrant. 2 Will. 225.
1 Esp. 611. 3 Co. 52. b.

But a officer can't retake a party whom he has thus permitted to go at large nor can he maintain an action vs. him. He can't take advantage of his own neglect &c.

3 Co. 52. 1 Sid. 330.
2 For. 176. 3 Bl. 415.

If then a Shiff. be suffering a voluntary escape & takes he is guilty of false imprisonment. 2 Bac. 250. 1 W. 212.
2 For. 176. 1 Kent. 253.

For a detention is illegal, the Shiff. is "particeps criminis".

2 For. 176.

1 Kent. 259.

But if p^lty. in such a case may retake
& this he may do even though he has already
recovered in an action vs. & D^lty. or another
especially if damages in action (Dul. 34. 1st. 611.) were less than
damages vs. & D^lty. But if damages were as great it is a question. Mooted.

But in case of negligent escape & D^lty. or
other officer has a right to recaption.
for he is liable over to & D^lty.

12th. 612. 13. 1 Co. 52. b. 6. E. 235.

10th. 25. 6.

As if a bond has been given to & D^lty. to
indemnify him his remedy is & D^lty. and
if no bond given, in an action vs. & D^lty. 12th. 151.

24. But if D^lty's bailiff can't have at & D^lty. have
an action of & D^lty. escape even though he is
subjected for & D^lty. escape, for by virtue of
his contract he is liable to & D^lty.

7th. 116. 7. 1 Co. 1. 349. 12th. 613.

20th. 20. 18. 19.

A mere bailiff is a private officer & lia-
ble to & D^lty. only.

He can't recover vs. & D^lty. when he has pd. his debt be-
cause he is considered as a mere volunteer. It is like a contract
by & D^lty. with B. to indemnify B. for any trespass by J. S. upon
him. (say) J. S. may recover of B. for & D^lty. damage sustained
but J. S. can never recover vs. J. S. for as to J. S. it is
a mere volunteer. & J. S. is liable to B. only on his contract.

If a man arrested on criminal process, escape
he is punishable by fine & imprisonment, it being a
crime.

If he escape on prison-breach he is guilty of
trespass, & is a misdemeanour.

4th. 129. 40. 2 Wark. 122. 8.

The rule as to prison-breach seems however, not to be
enforced in modern practice tho it undoubtedly exists.

An officer, who after an arrest of a felon, sup-
ports a negligent escape is punishable for
fine, but if he suffers a voluntary escape, is guilty of a same crime as a felon.
For an officer who suffers a voluntary escape
is an acceptor after arrest.

State Pl. Co. 390, 2 Hawk. 179. 4 Bl. 150

The officer is not punishable for a felony until
a principal felon has been convicted, for
a felony by a principal felony must be clearly pro-
ved, or there can be no acceptor.

4 Bl. 130, 8 ib.

If for a negligent escape in civil pro-
cess, the officer has been compelled to pay a debt in
man. Doubtless maintain vs. a case set
"indebted against" for many years &c.

Exp. 612.

And a same has been twice determined at
N. H. where a case was voluntary, in
Gaoler a deputy. Exp. 612.

Decided contra by Ed. Keaton.

2 J.R. 181.6. Peab. R. 146 & 217.

A Deputy, who supports a voluntary escape & a staff.

is compelled to pay the sum maintained in ac-
tion vs. a party escaping. (For it is contra to a maxim in pri-
vate, that a party who is liable for a debt, is not liable for a superior one.)
In case of negligent escape, a King, retains
a prisoner on arrest suit before action set
off himself. His liability to a party is
discharged, because a party has sustained no damage.

[But where a deputy permits, it may be very difficult. (mosted)]

Exp. 511. 2 Mac. 277. 4 Mac. 968.

3 Co. 445. 1 Inst. 1617. 2 J.R. 126.

That is an action vs. a party is not common vs.
a person a subject. A case of action does not
discharge him, for when action was lost, there was a complete
right of action, & by commencing a suit a right of recovery attached in,
nothing subject. can be set. 1 Roll 808. 2 Co. 111. 2 Mac. 875. 3 Co. 637.
1 Mac. 637. 3 Co. 4452.

4 voluntary return of prisoner ^{from negligent escape} into custody
before action lost vs. 3 J. P. is equivalent
to a recapture on fresh suit, & 3 J. P. is dis-
charged, for 3 prisoner is again in custody before action / 13. 8. D. 413. 2 M. 126.
Comm. R. 554.

But in case of a voluntary escape, recapturing
is no excuse for 3 J. P. for he is "guilty
of a criminal act" 11. 12. 36. 52. 6.

Besides by voluntarily abandoning his custody of 3 prisoner
his right is lost forever.

And in such case a voluntary return
does not save 3 J. P. 11. 12. 2 M. 126.
He has no right to detain him. 12. 1. 271.

But if 3 escape is negligent, 3 J. P. may
in his own discretion retake even after action
lost vs. 3 prisoner. 12. 1. 271.

28. If after a negligent escape 3 J. P. in
process discharged & prisoner, & gaoler can't retake him
to secure 3 prisoner, tho' if there had been no escape
he might have detained him notwithstanding 3 discharge by 3 J. P.
The gaoler here has lost his lien by being before the negligence.

In analogy to all cases of transp. 12. 1. 271. 12. 1. 271.
In a negligent escape by a prisoner having
liberty of 3 J. P. a retaking, or returning
of 3 prisoner before action lost vs. 3 J. P. &
3 J. P. is no excuse. 12. 1. 271.

12. 1. 271. 12. 1. 271.

Yet 3 J. P. in such a case vs. 3 J. P. may
recover nominal damages on 3 J. P. by
indemnity, on 3 condition is broken.
12. 1. 271. 12. 1. 271.

And after such escape, neither 3 prisoner nor
3 J. P. can compel 3 J. P. to receive
3 prisoner, he has a right to excuse & send

J. Bennett being appointed to him at L.L.
Root 1007.

There is in pleading a rule wh. is very embarrassing to students.

The Rule is yt under a count for a voluntary escape, & Jtff. may give a negligent escape in evd. & J. Deft. may of course plead to such count, a retaking on fresh suit witht. J. avowt. yt J. escape was voluntary. 1 Vent. 211. 2 I.R. 126.

How then is J. Jtff. to avail himself of J. distinction between neg. & vety. escapes? By making in his replication a novel assignment.

It is important to state it as voluntary in J. Decr. It shd. come out in J. replr. in answer to any defence it may be made vs. a negligent escape. "Decur, it shd. be leaping before you come to J. stile" says Le. Coke.
1 Vent. 217. 2 Bac. 248. 2 I.R. 124.

In a voluntary escape J. Deputy or gaoler who suffers it is liable as well as J. Jtff. himself, tho. in a negligent escape, J. Jtff. only is liable. This is not a mere non-feasance but a positive misfeasance, & is like a rescue.

2 Cowp. 403. 2 Esp. 603.

And if in J. case J. Jtff. bring his action vs. J. Deputy. he exchanges J. Jtff. & by this waives his remedy vs. J. Jtff. & relies on his action vs. J. Deputy alone. 14th 6. 21. 25. 1 Esp. 612.

If in an action vs. J. Jtff. for an escape J. original Jdggt. is reversed, before J. Jtff. pleads. He may plead "nul tiel record" & discharge himself by that plea.

Ex. action vs. a Sheriff, but before he is oblig-
ed to plead to the action, a judgment in the original
suit is reversed, now he may plead "not till
record" for a reversal except by a judgment absolute,
so that no case can be made out vs. him.

But if a judgment is reversed after he went
availing himself of it, having bound him-
self by some other plea, or by special
leave to a Ct. to alter his plea, or if judgment
is had vs. a Sheriff it must stand, & can't
be reversed merely because a other judgment is
reversed.

8 Co. 142. b. Hob. 209.

3 Mod. 225. 2 Mac. 240.

This seems clearly unjust, for by
rehearsal it seems clear that a Sheriff has
no right of action vs. a Capt.

The Sheriff may, however, be relieved
by *audita querela* & presume for it is a case
of a kind he may be relieved vs. in this way.
(Must Ct.)

8 Co. 143. b.

A voluntary escape works a forfeiture of a
Sheriff's office, or of an officer permitting
a negligent escape does not; for a volunt-
ary escape is a public offence.

Walt. 272. 3 - 3 Lev. 288. 2 Lev. 81. 2 Mac. 240. 3

3 Mod. 146. 2 Hask. 146. b.

Of False Returns & Miscellaneous Rules.

By 3 com. law it is 3 duty of 3 Shff. of each Co. to furnish a sufft. com. jail, & must do it at his peril, - if then 3 prisoner escape thro 3 insufficiency of 3 goal, 3 Shff. is liable. Esp. 610.

By 3 Stat. if 3 state each Co. is to furnish its own jail.

If then a prisoner escape, thro 3 insufficiency of 3 jail, no by fault of 3 Shff. 3 Shff. is not liable, but 3 Co. to 3 Shff.

And 3 remedy vs. 3 Co. is a memorial to 3 Co. &c. & an appeal may be had to 3 Sup. Ct.

2 Root 30 Kirk.

1 Root.

275. 278. 257. 450. 505.

And 3 liability of 3 Co. here is mostly now just nominal.

3 Shff. is liable to an "action on, case" for a false return to 3 party aggrieved.

1 Shff. 306. Esp. 515.

Ex. Return of service on 3 Deft. when there has been none, then 3 Shff. may sue him

If 3 Shff. shd. make a false return of "non 28.

est inventus" as to person, & nulla bona as to goods of 3 Shff. Co. in 3 party aggrieved.

"Actn. on case" 4 Bro. E. 529. 2 Stra. 650. Esp. 515.

29. If 3 p^{ty}. in a jdg^t. discharge from custody
 & debt. taken in exec. whether committed or not,
 he can never aft. retake him, nor in any way en-
 force 3 jdg^t. It is a discharge for 3 debt, & 3rd in exec being
 second time a satisfaction; & 3 p^{ty}. having taken this highest remedy, must
 abide it. 1 W. 2482. 8 J. R. 123. 7 D. 320. 6 do. 525. 1 do. 557.
 107 a. 53. Chit. 182. ex. 182.

And tho 3 discharge were in consideration of a
 new promise to pay. & 3 promise is broken,
 & note is 3 same, we cant be retaken nor sued in debt
 on 3 jdg^t. 1 J. R. 557. 6 do. 525. 7 do. 320.

But may be on 3 new promise. 47 W. 2482. 2 Cas. 243.

And tho 3 new cont^t shd. be defeated for
 want of some requisite or on account of some
 irregularity still; note is 3 same.

1 J. R. 557. 6 do. 525.

And if 3 p^{ty}. shd. in 3 case supposed, discharge
 & debt. from custody upon a bond given by debt. that
 he shd. be again delivered into custody, this bond wd.
 be void, as having for its object an unlawful act
 sh. in this case is false imprisonment. & 3 debt. for it
 wd. be contrary to law to imprison after such a
 discharge.

And if two joint-debtors are taken in exec.
 a voluntary discharge by one of them by, cond.
 is a discharge of 3 whole debt. for
 they are both liable for 3 whole.

1 W. 651. 1 L. R. 690. 1 Inst. 93. 2 Inst. 571. 5 Inst. 66.
 Chit. on 182.

This holds only between joint-debtors. for
 when two persons are liable for the same

sett, by separate contracts, a discharge to
one is no discharge of the other.

2 Bl. R. 1235. 4 T. R. 825.

2 Wob. 481. Chit. Rep. ex. 115. 124.

It was formerly held, that if a ^{sole} debt. person
is execn. dies in prison & debt is discharged
for & pty. has elected his highest remedy.
But this soon after was not consid. law.

2 Bac. 354. Holt. 52. Bro. J. 156.

See by 21 Jac. 1 which is a declaratory & stat.
it is declared, explained, & enacted, that when a sole debt.
dies in prison, & pty. may sue out a new execn. vs. & estate of
deceased, as if there had been no prior execution. 2 Bur. 354. T. R. 183.
And it has always been held, that if one of two
joint-debtors dies in prison & debt is not
discharged. 5 Co. 80.

By 3 Eng. Stat. 23 Hen. 6. called 1st.
vs. cage & gaol. enacted, that if a
prison bond is given by prisoner to pty.
with condition, that & obligor shall remain
in prison, till & debt paid & expenses of bond are whol-
ly paid, is wholly void, it being as to & bond & fees vs.
& Stat. 1 Tent. 237. 1 Bro. C. 179. 12 T. R. 583. 12 W. R. 195.

10 Mod. 159. 10 Co. 100. 6. 3 Bro. 58. a. 6. 4 Bro. 438. 484.

Holt. 14. 2 Wils. 257.

But 3 Stat. contemplates only prison obligations
wh. may enable & pty. to apprehend & prisoner on & pro-
fitable of & penalty. Contracts 36. 28.

(See 1 Root 158. 4 Bac. 461. -)

All prisoners are by & C. L. to support them. 32.
pelves, except felons attainted. - The latter are
deemed incapable of supporting themselves as their
property is forfeited. - 2 Bro. 58. 1 W. R. 192. 12 W. R. 583.

A person committed to prison for any offence is
by C. L. to bear his own charges, & the expen-

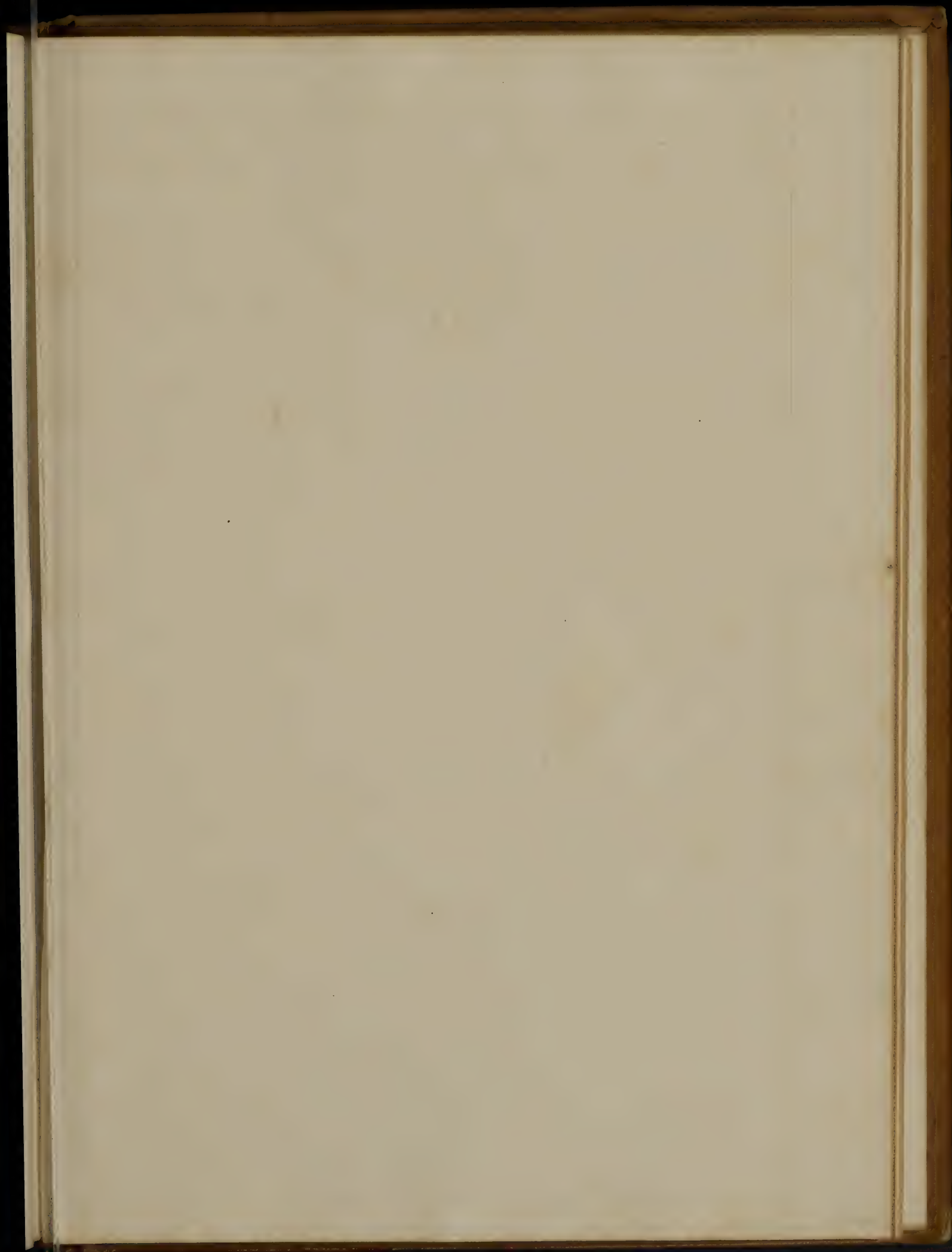
per of commitment, if of ability - & his estate is
subject to & payt. - But & expenses are reg-
ularly paid in & first instance out of the State
or Town - Treasury. - It. Comt. 221. 365.

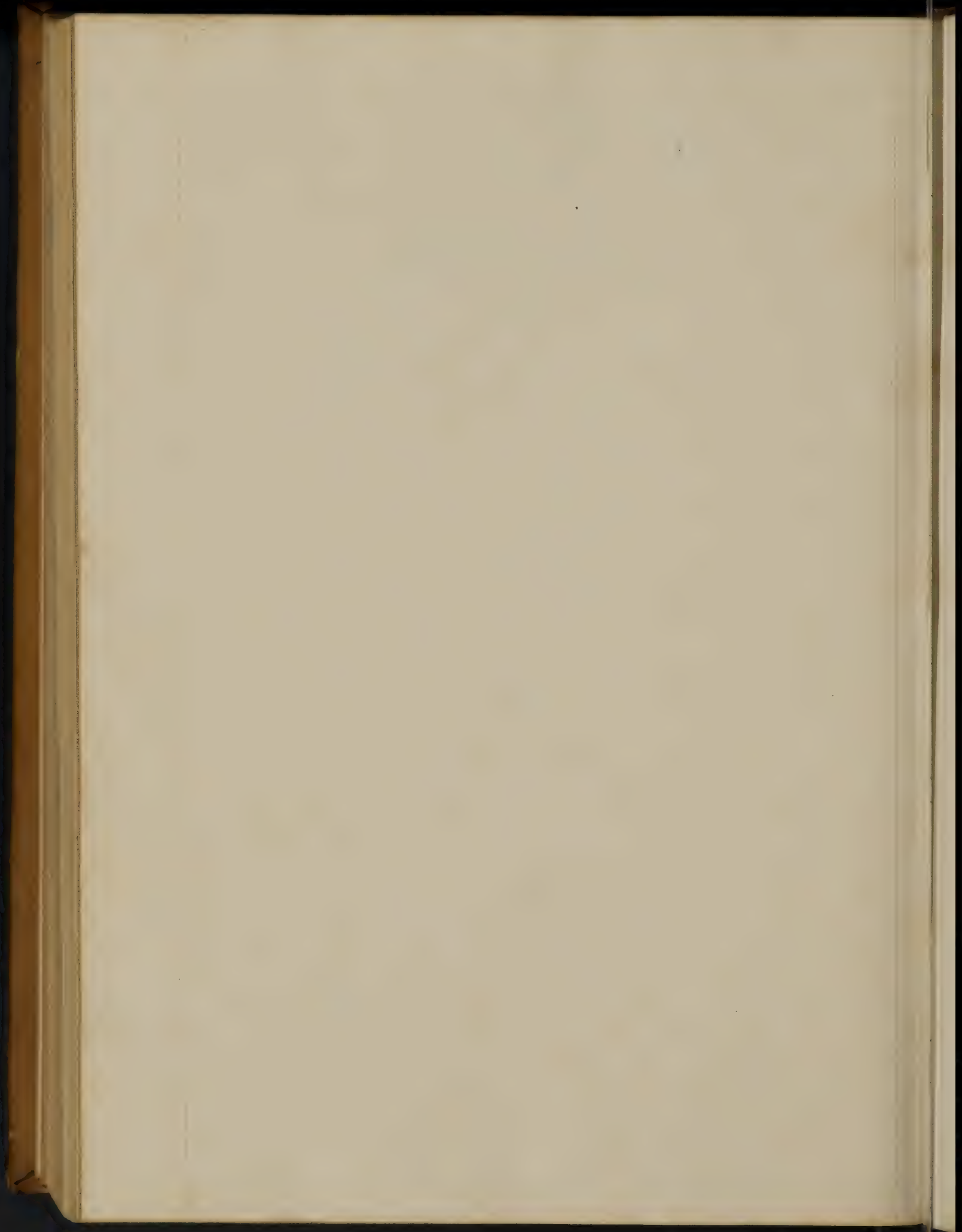
Miss "Violet & Faint."

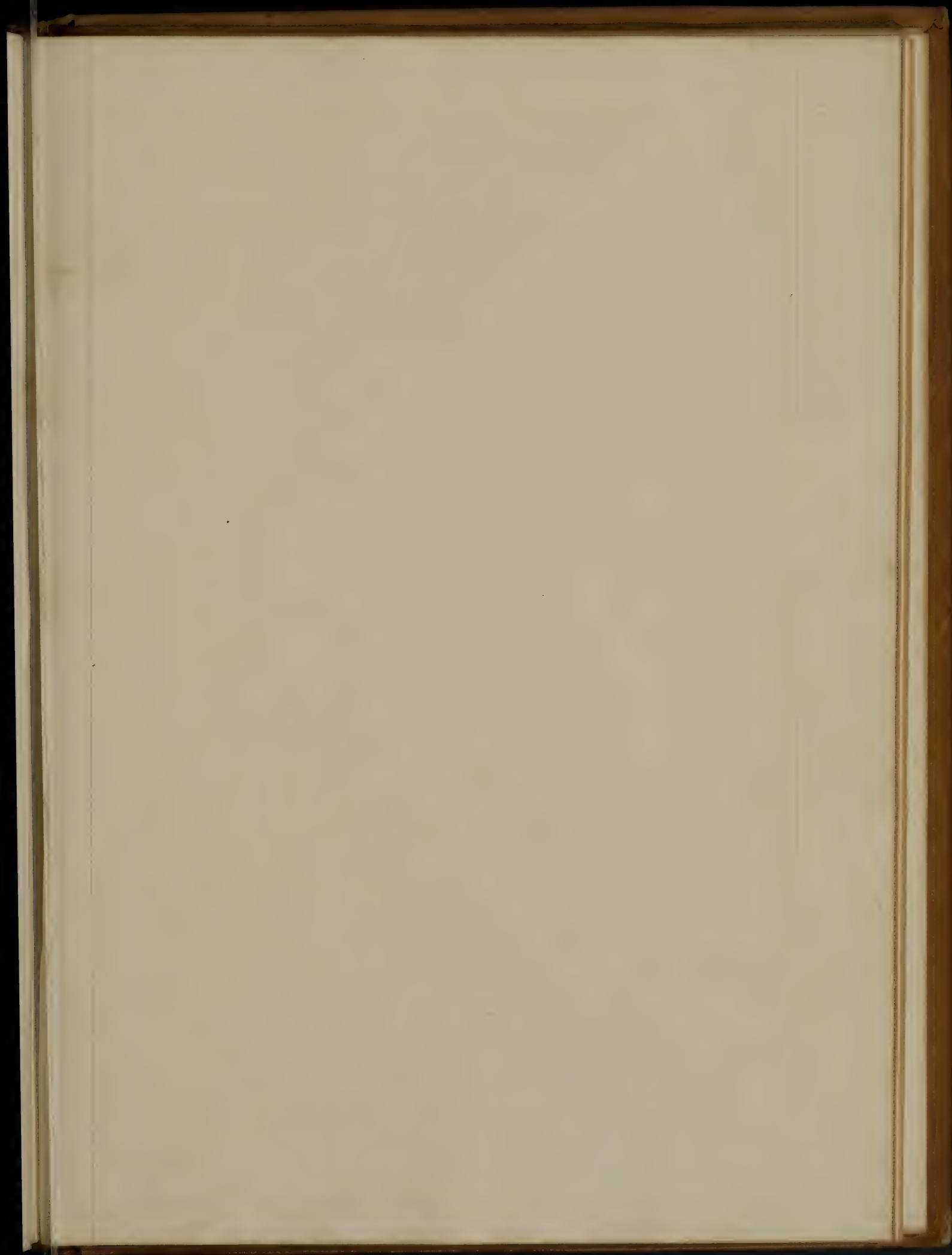
Litchfield Dec. 6th

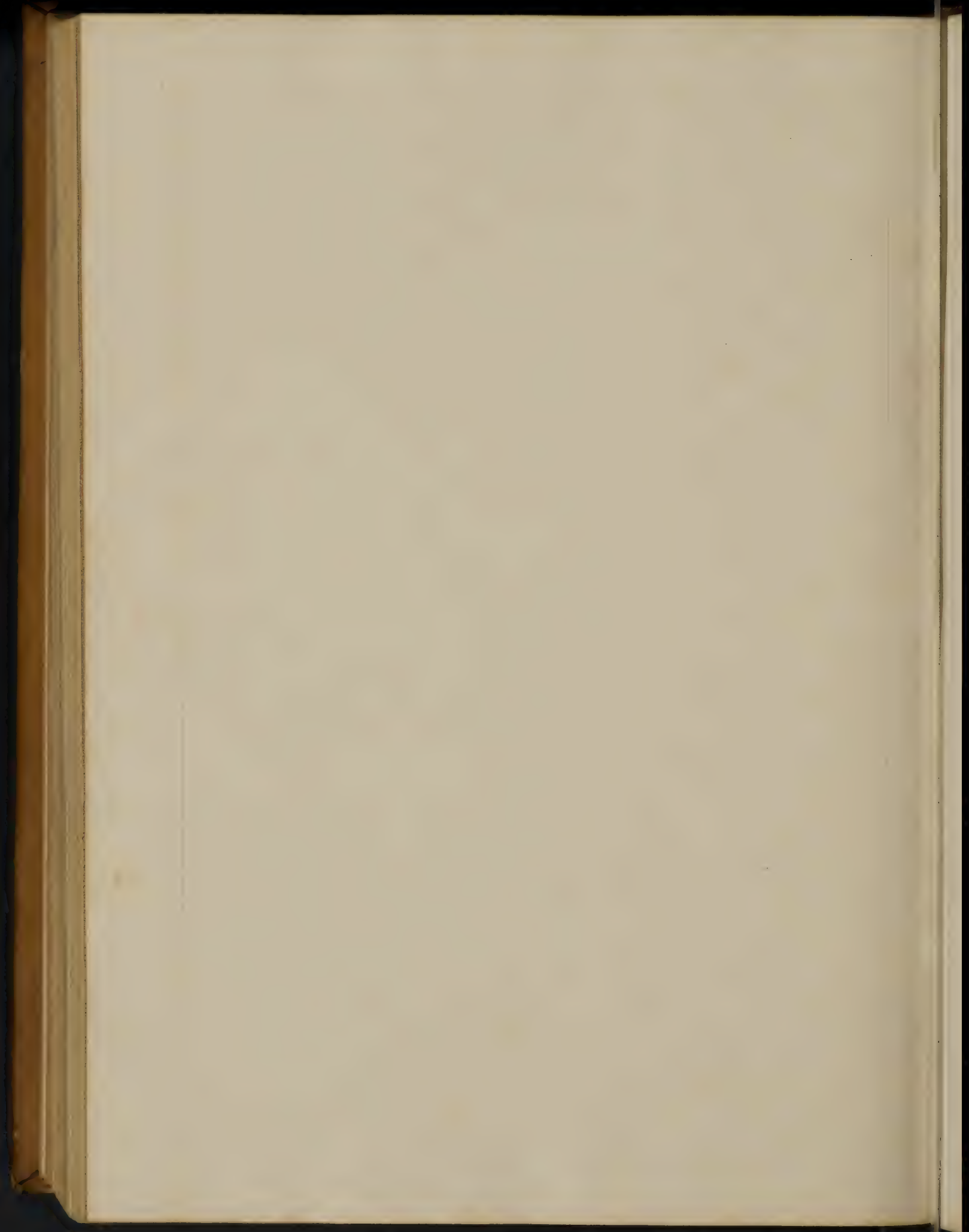
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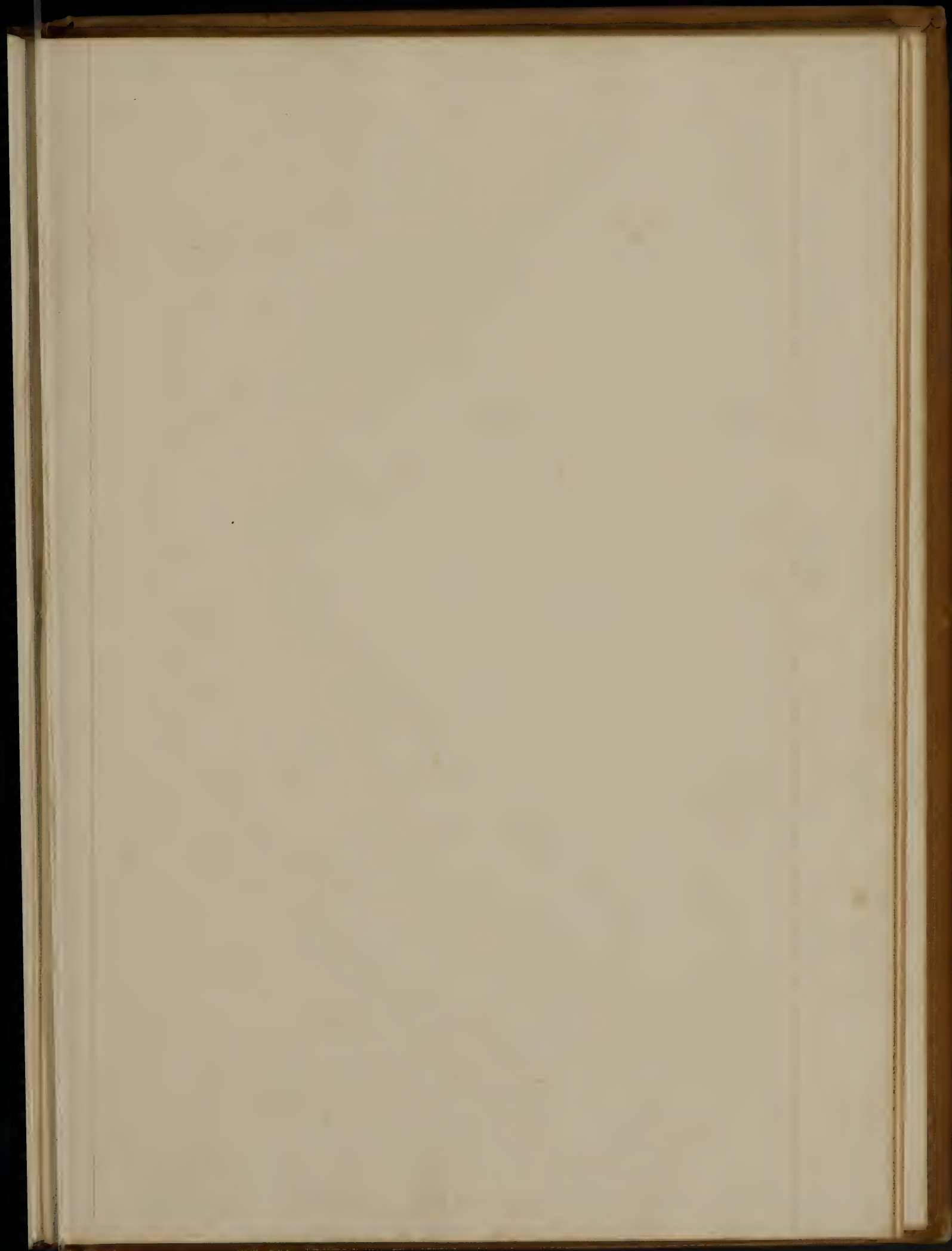
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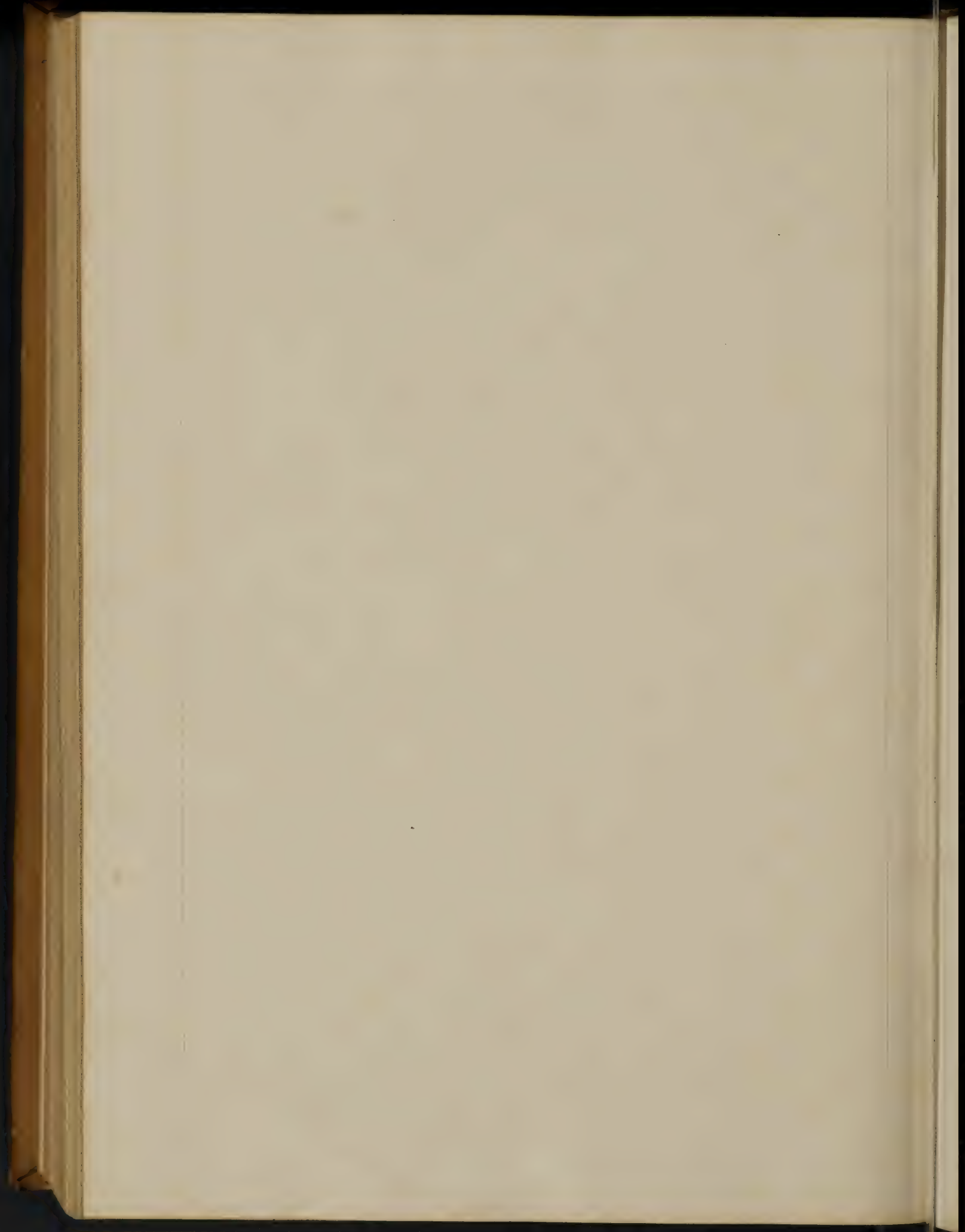


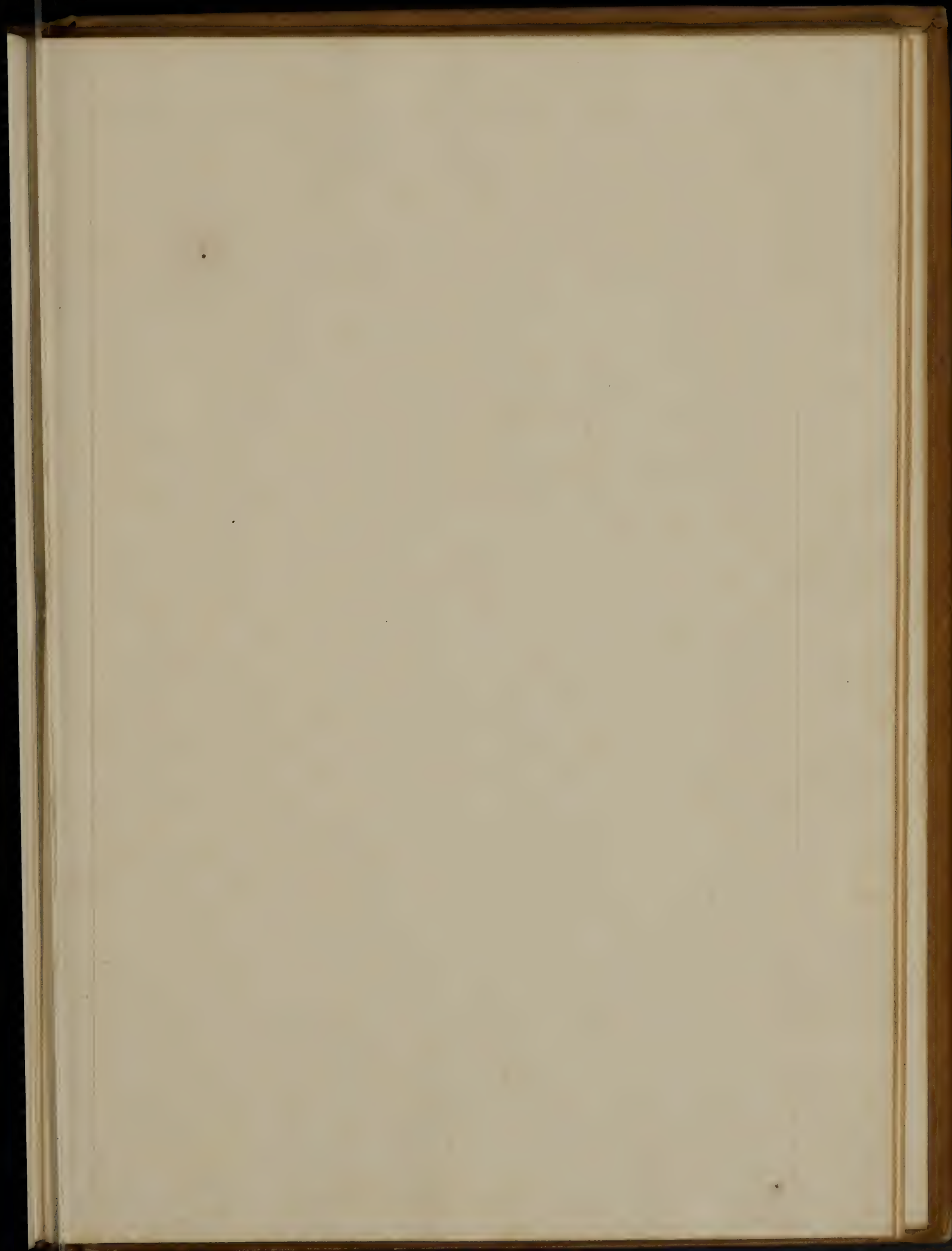


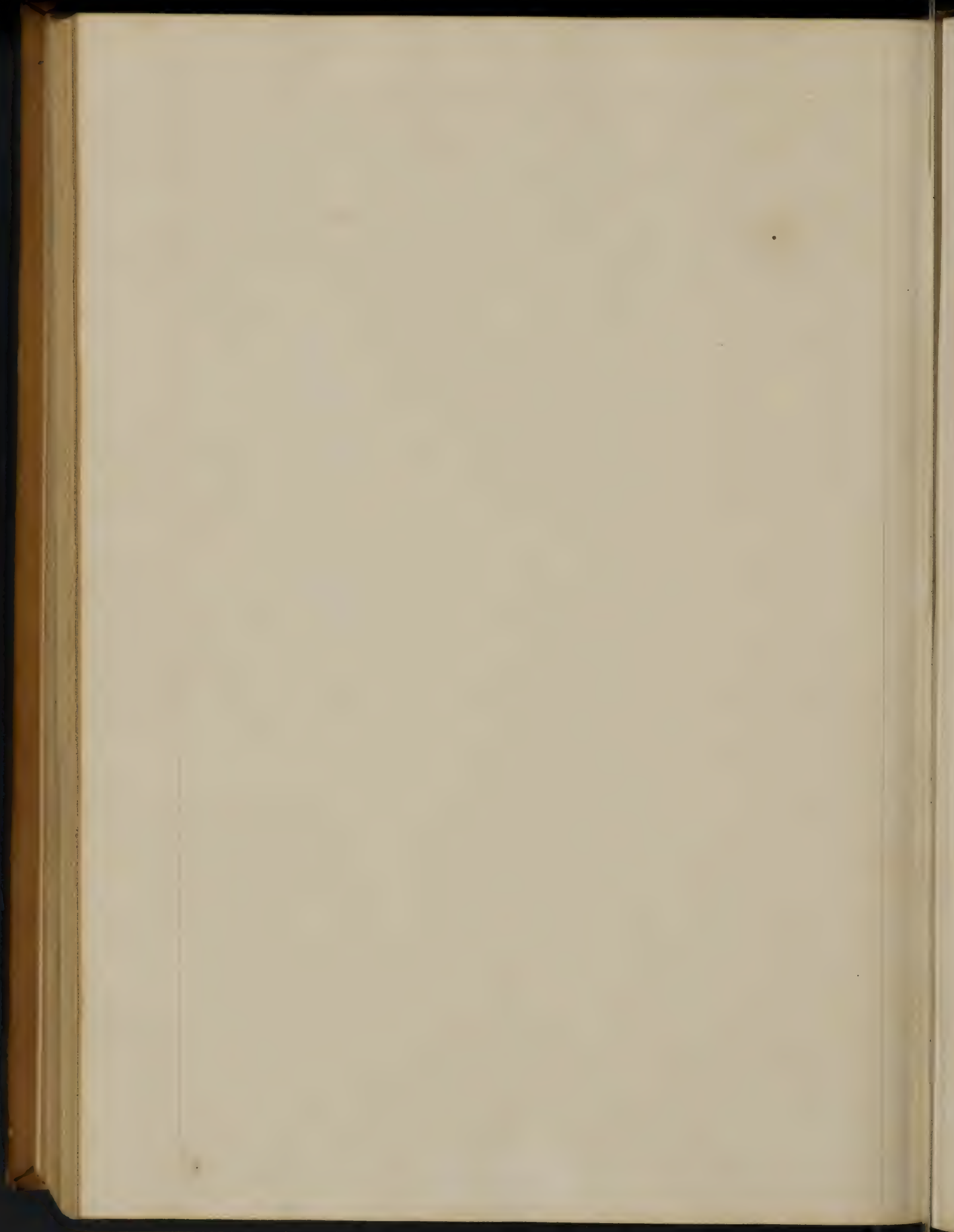


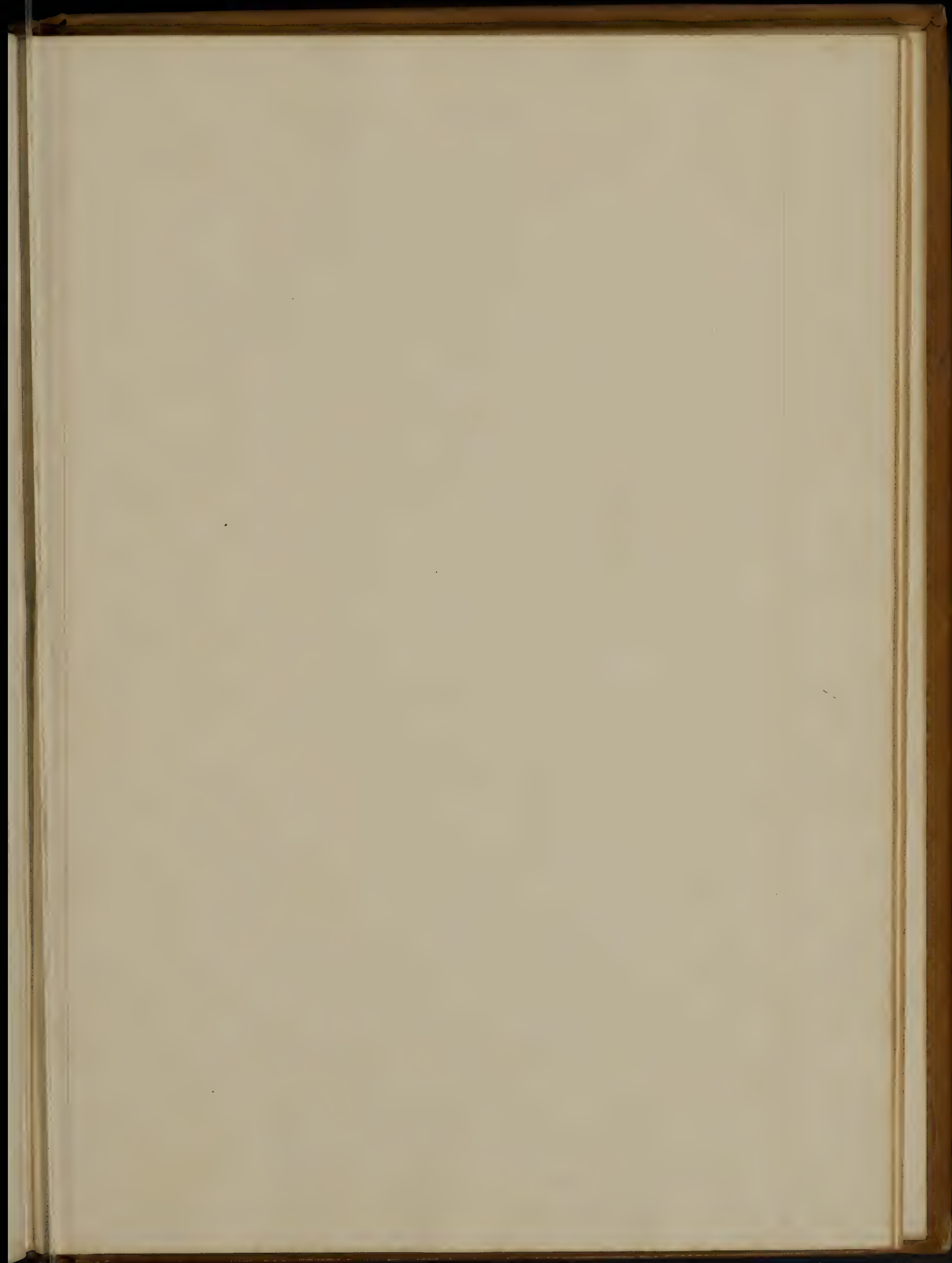


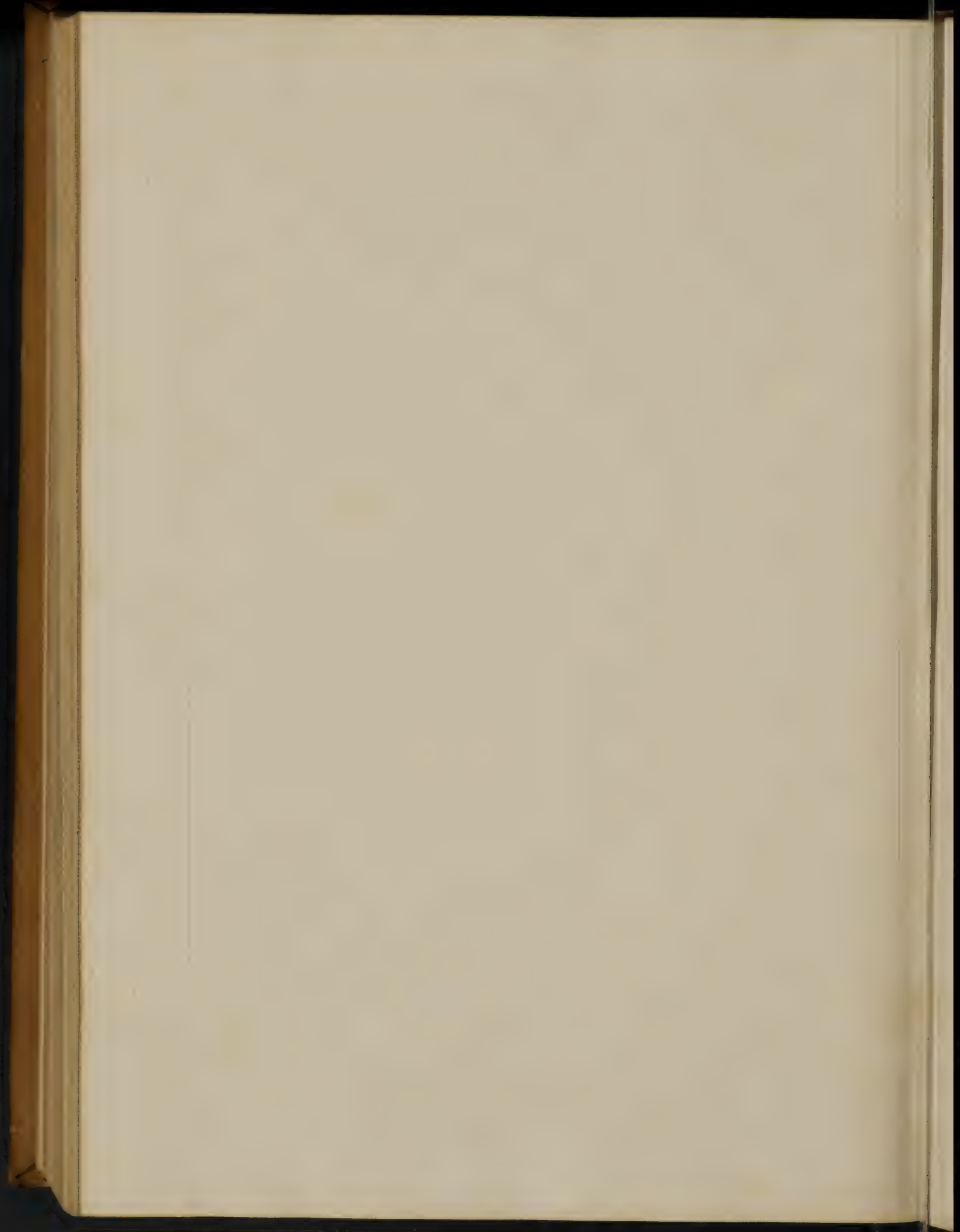


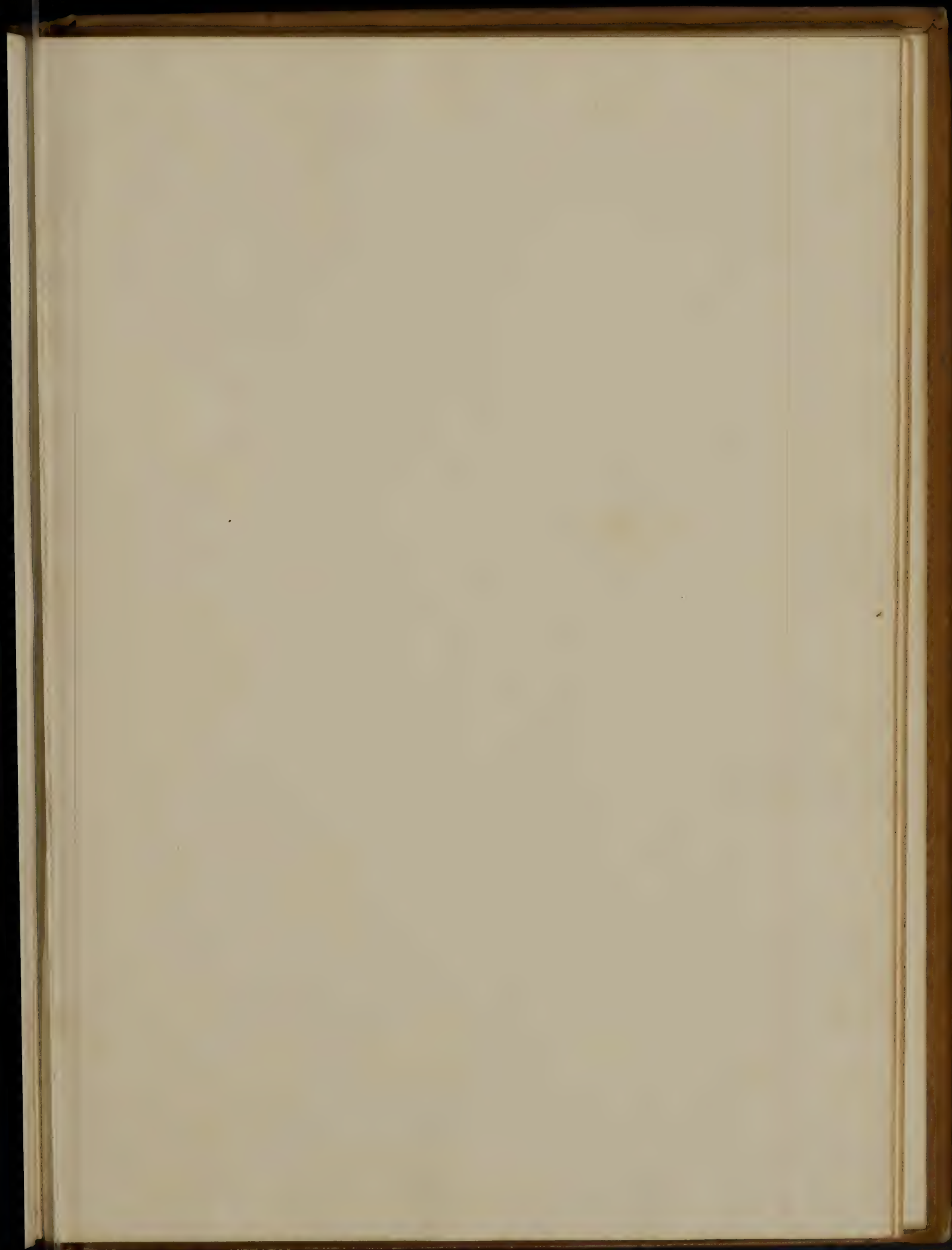


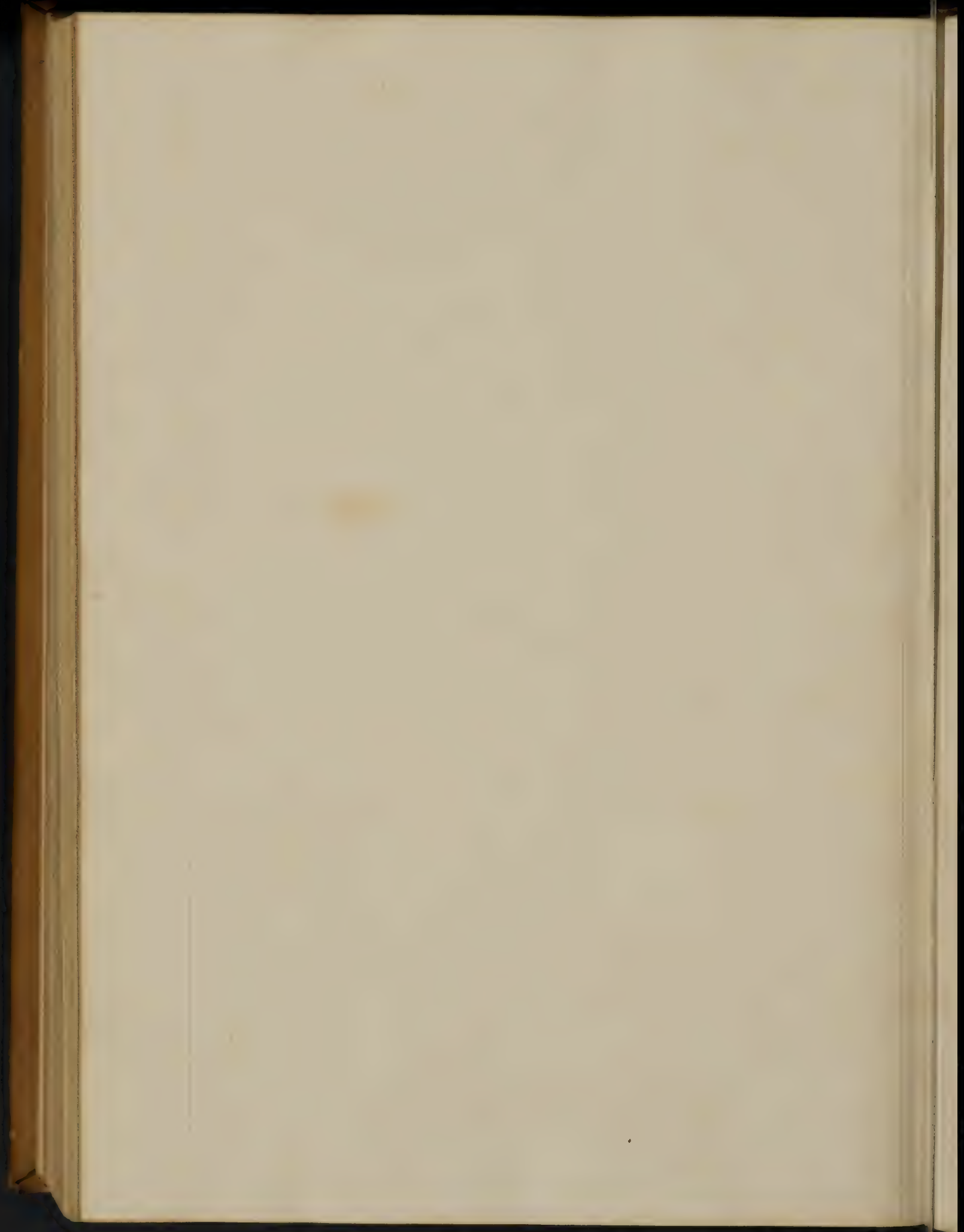


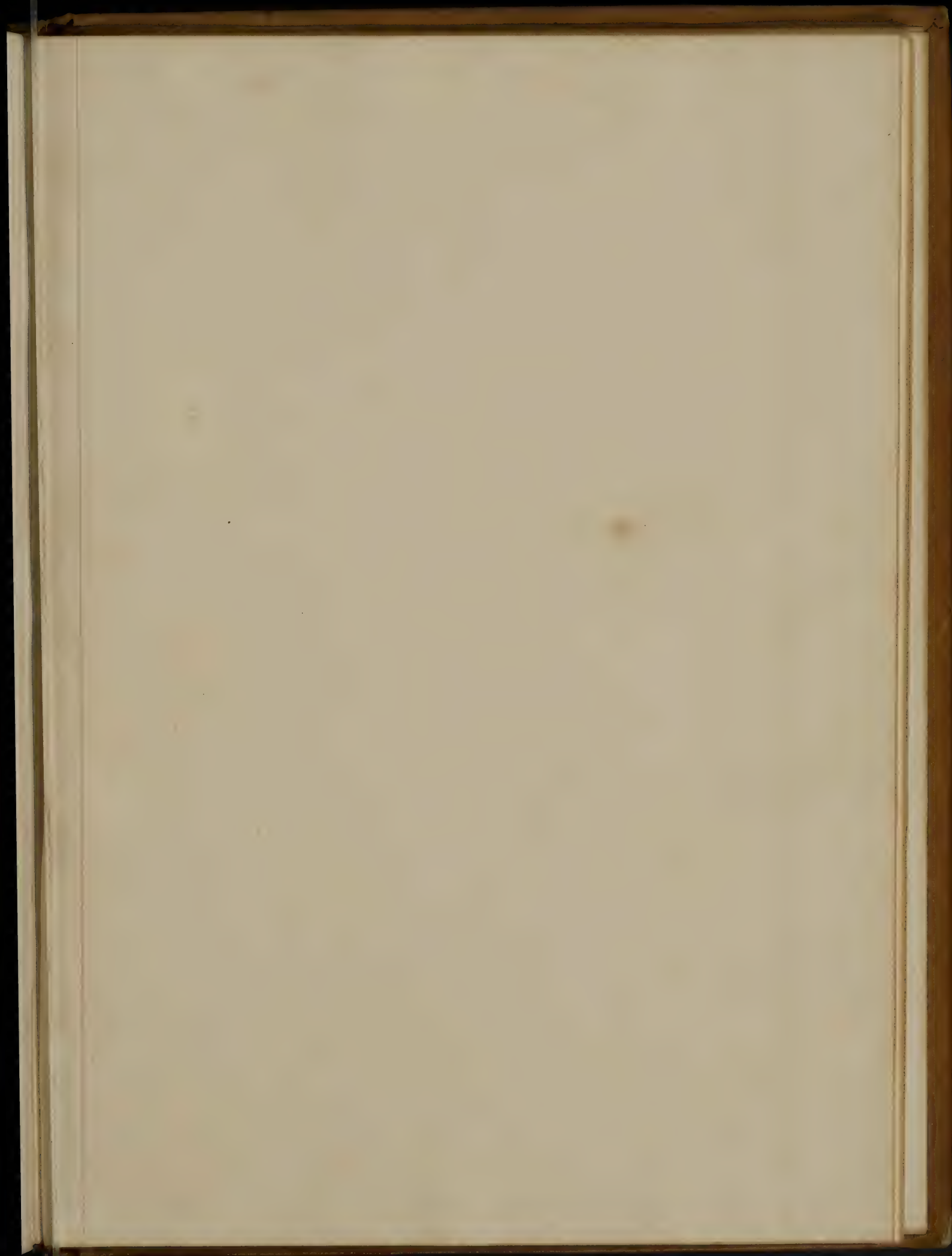


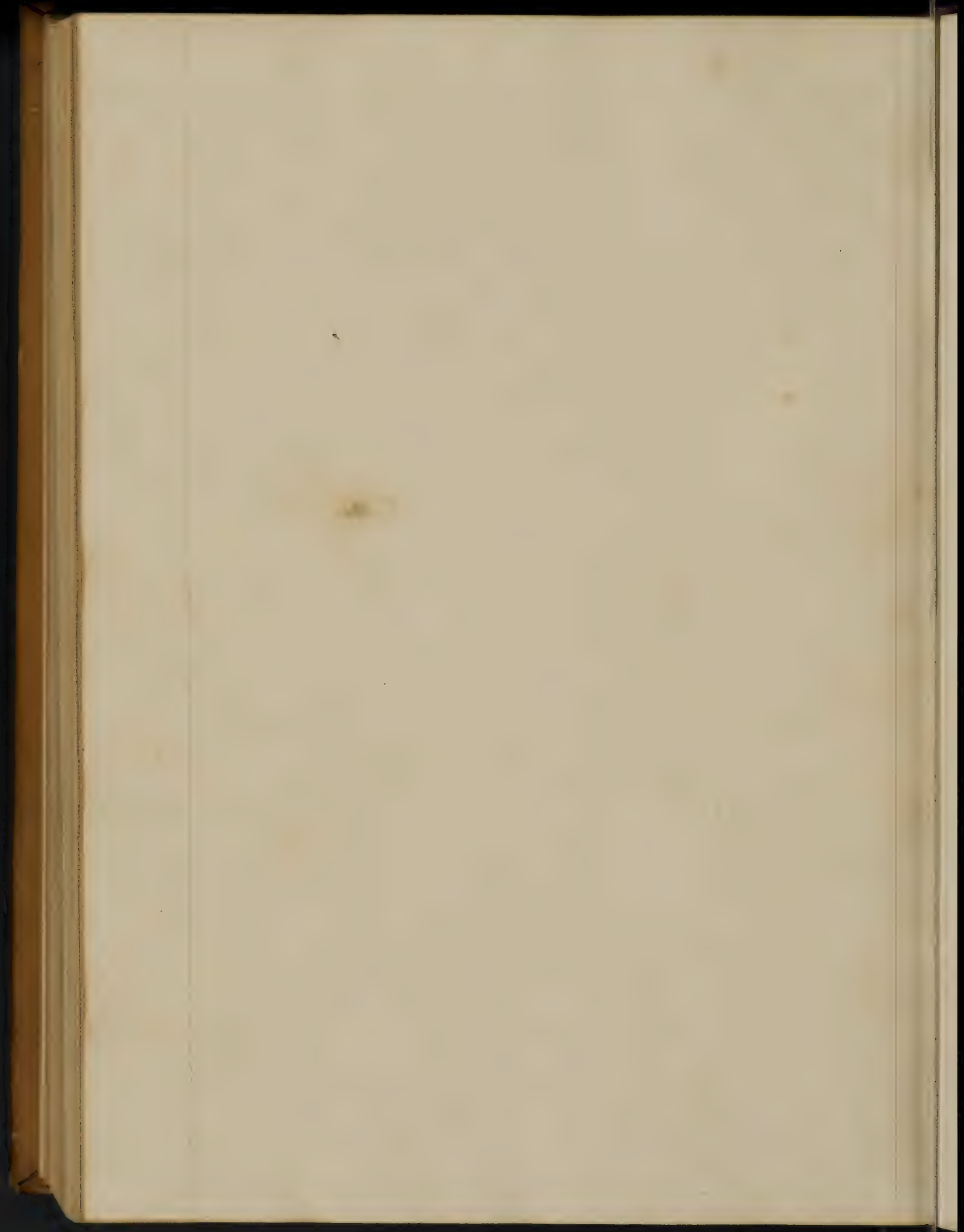


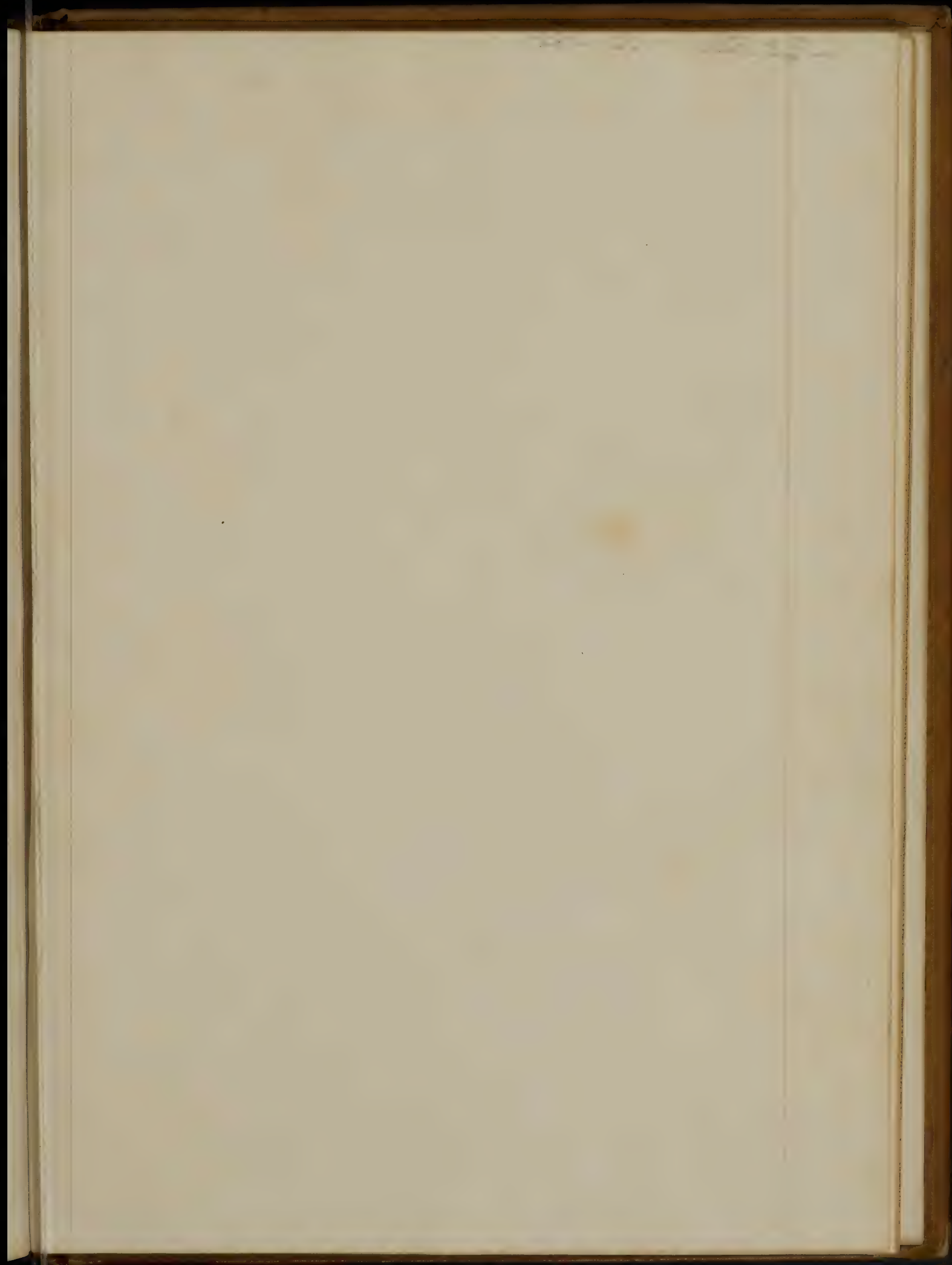


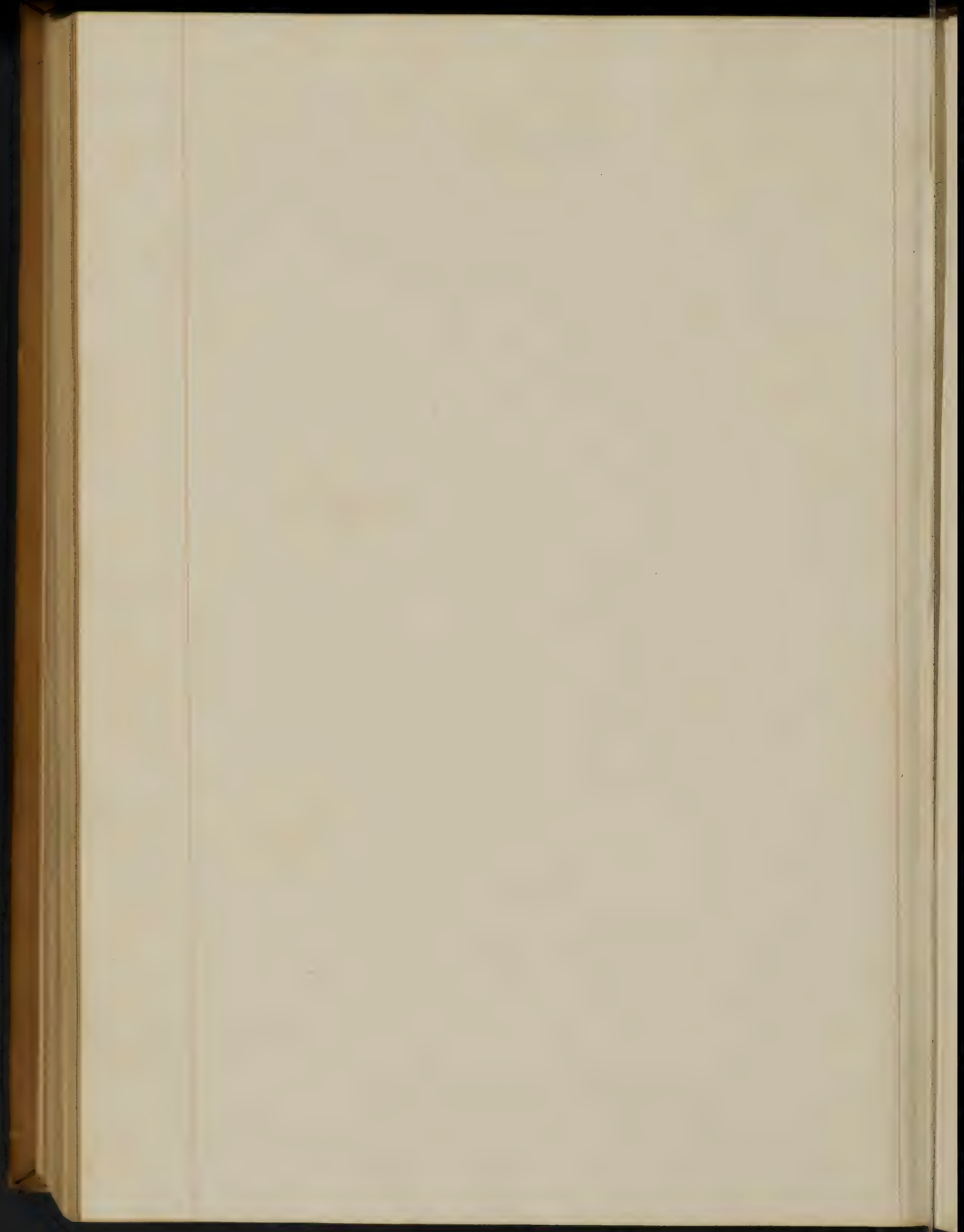


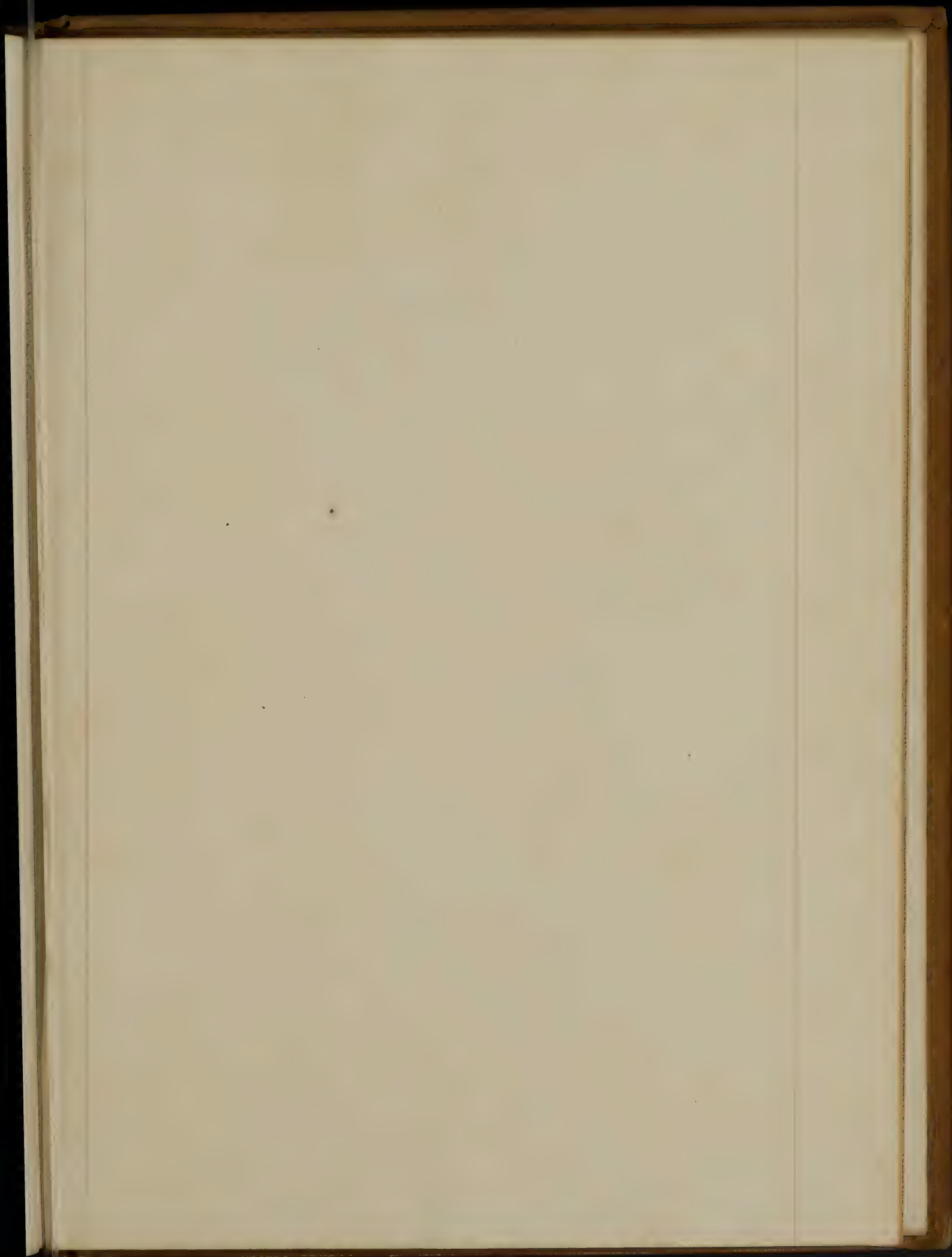


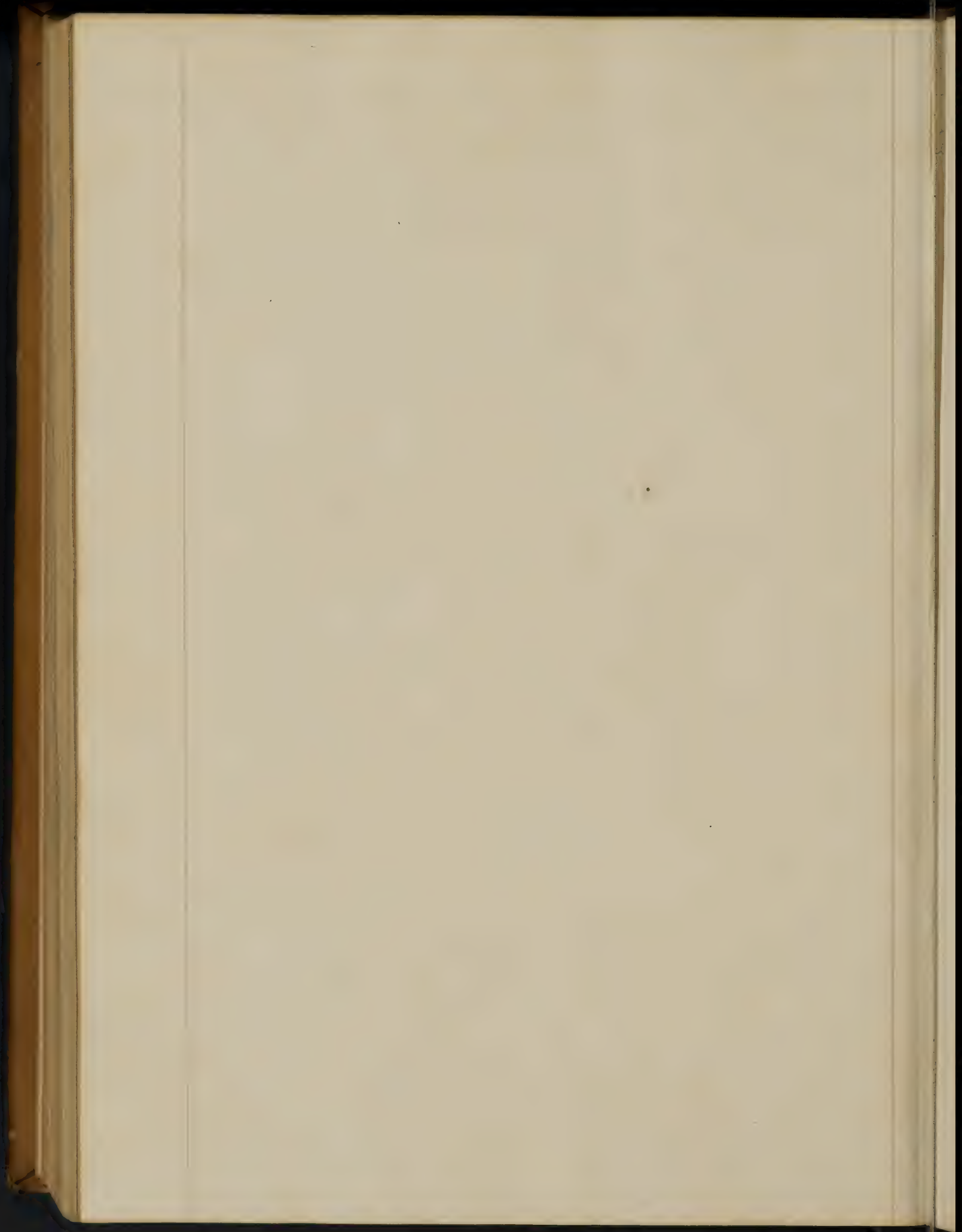


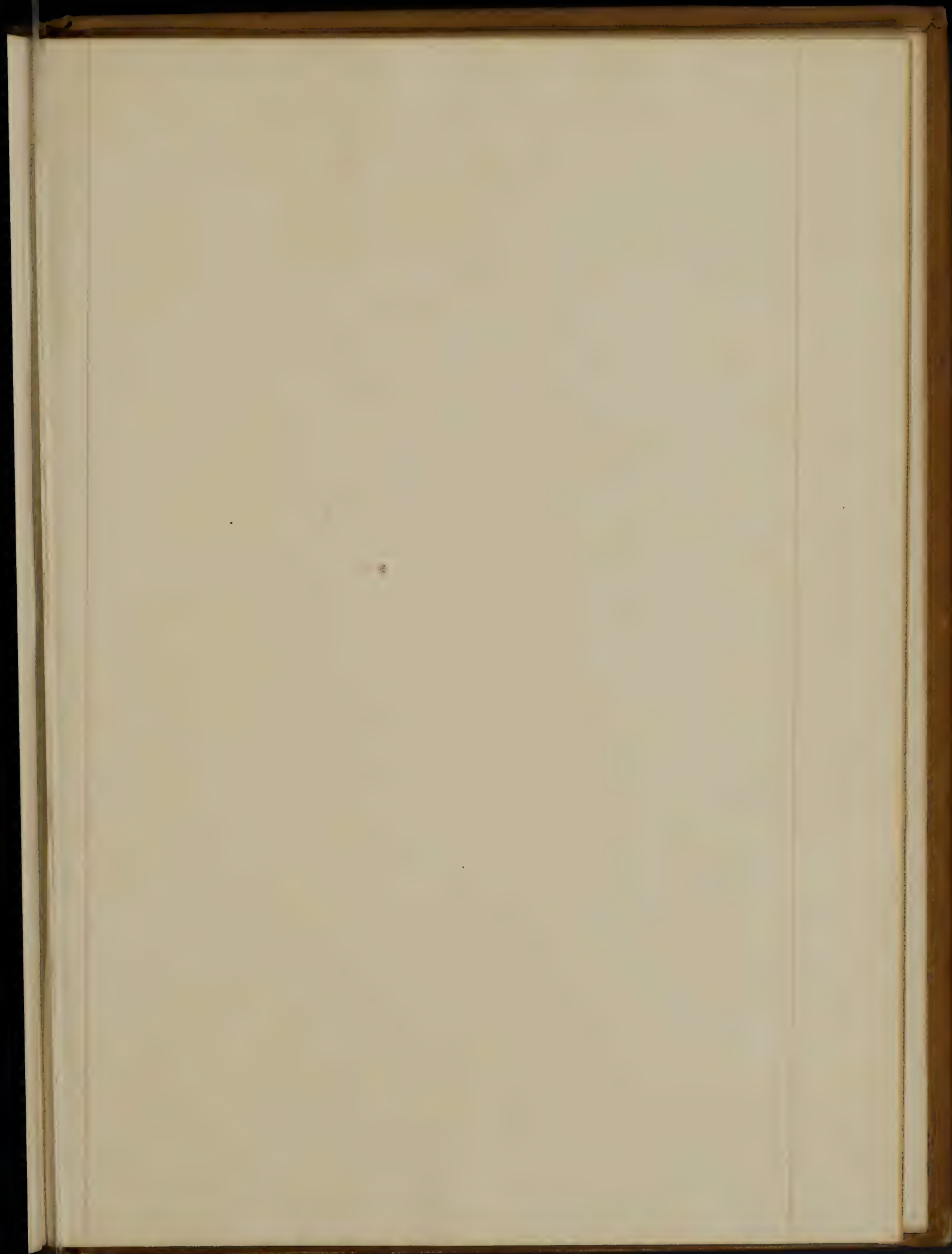


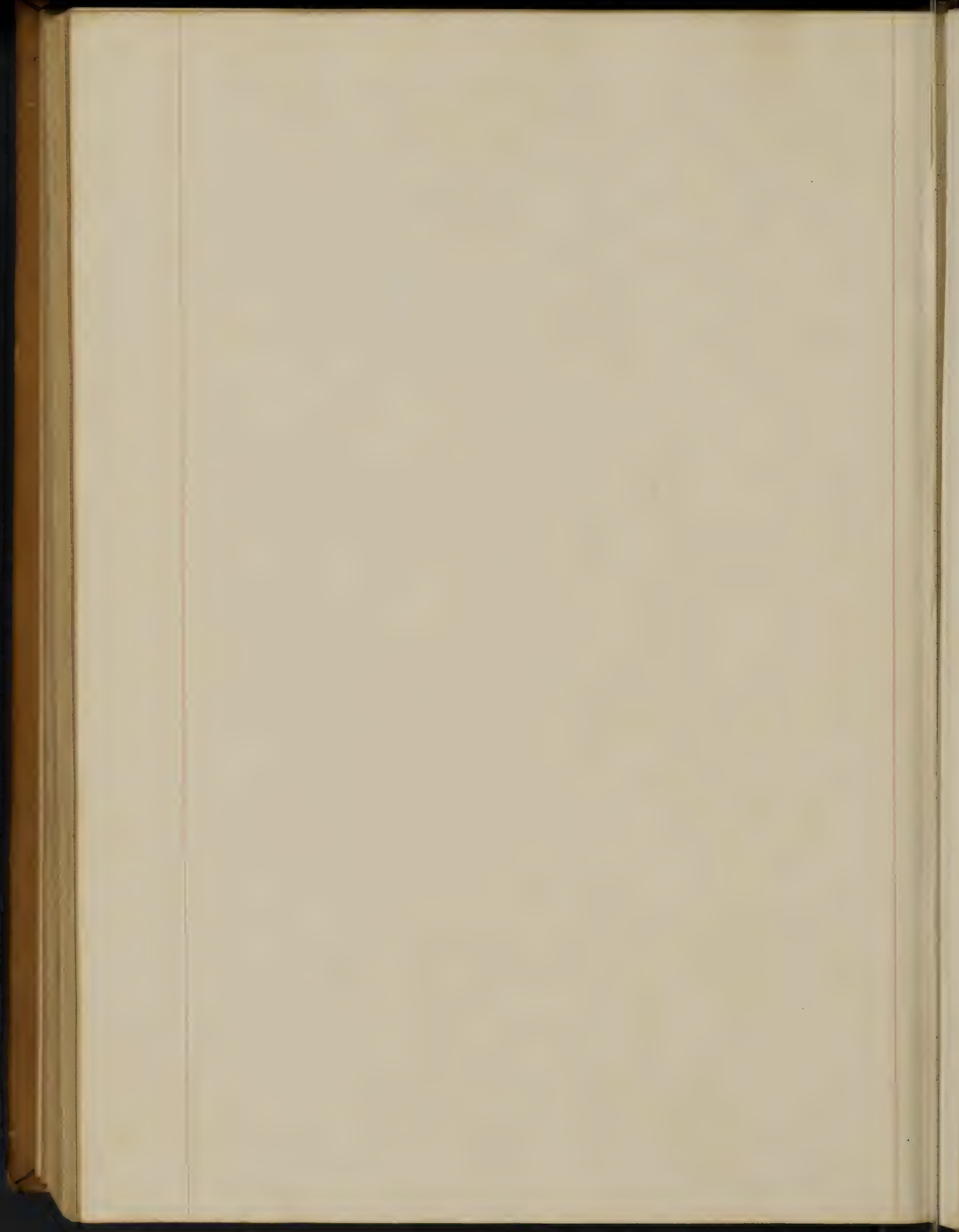


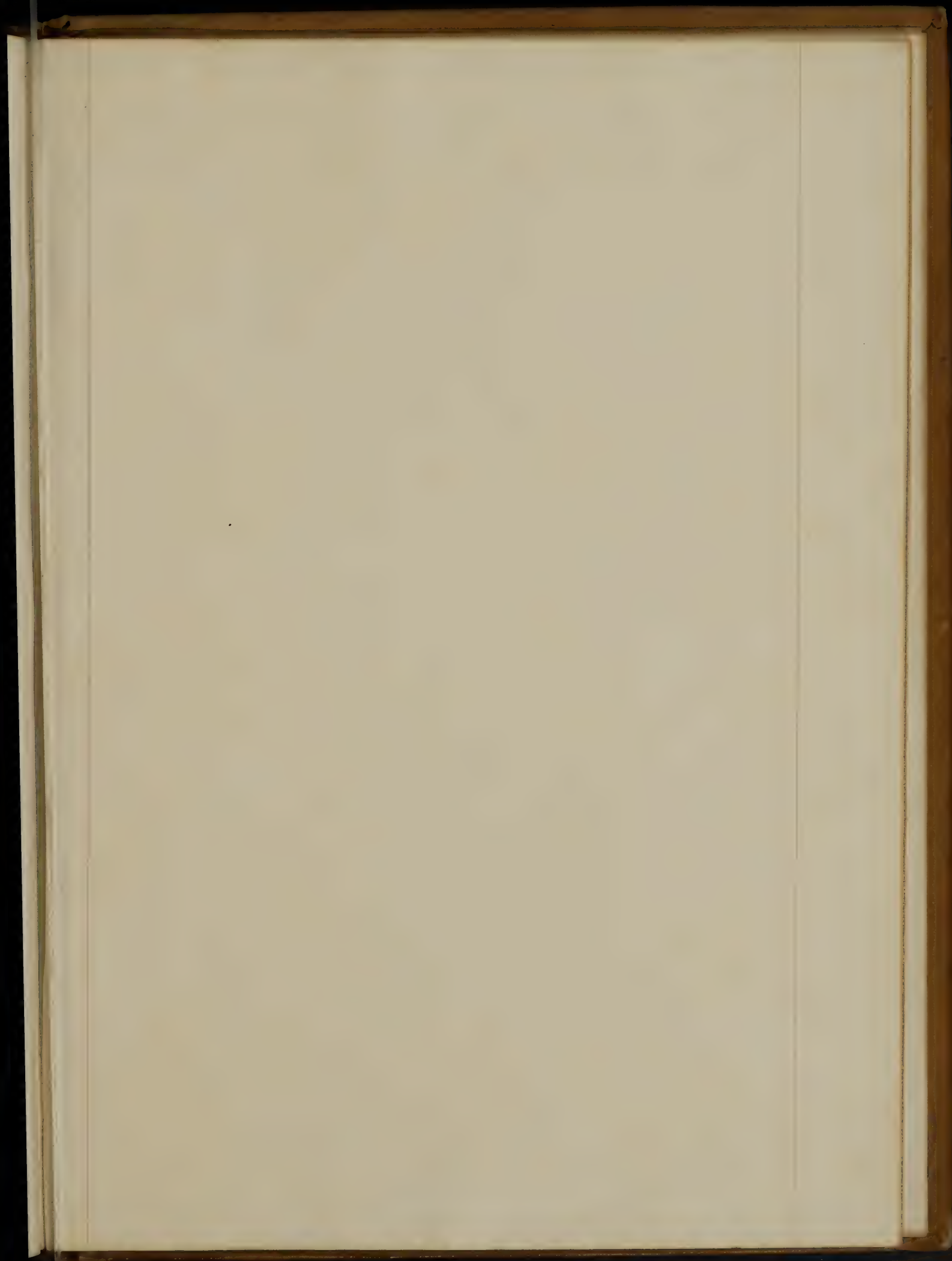


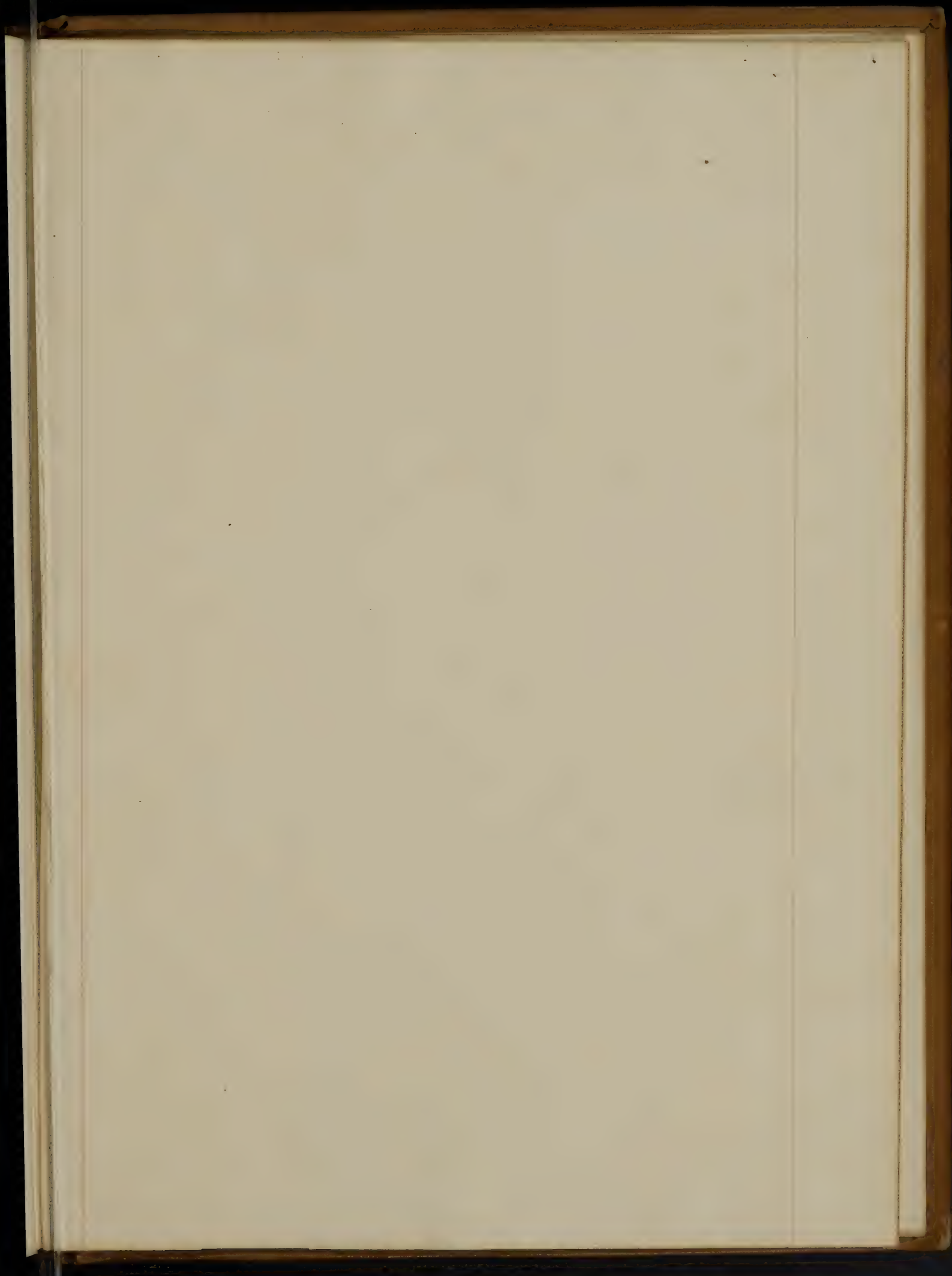


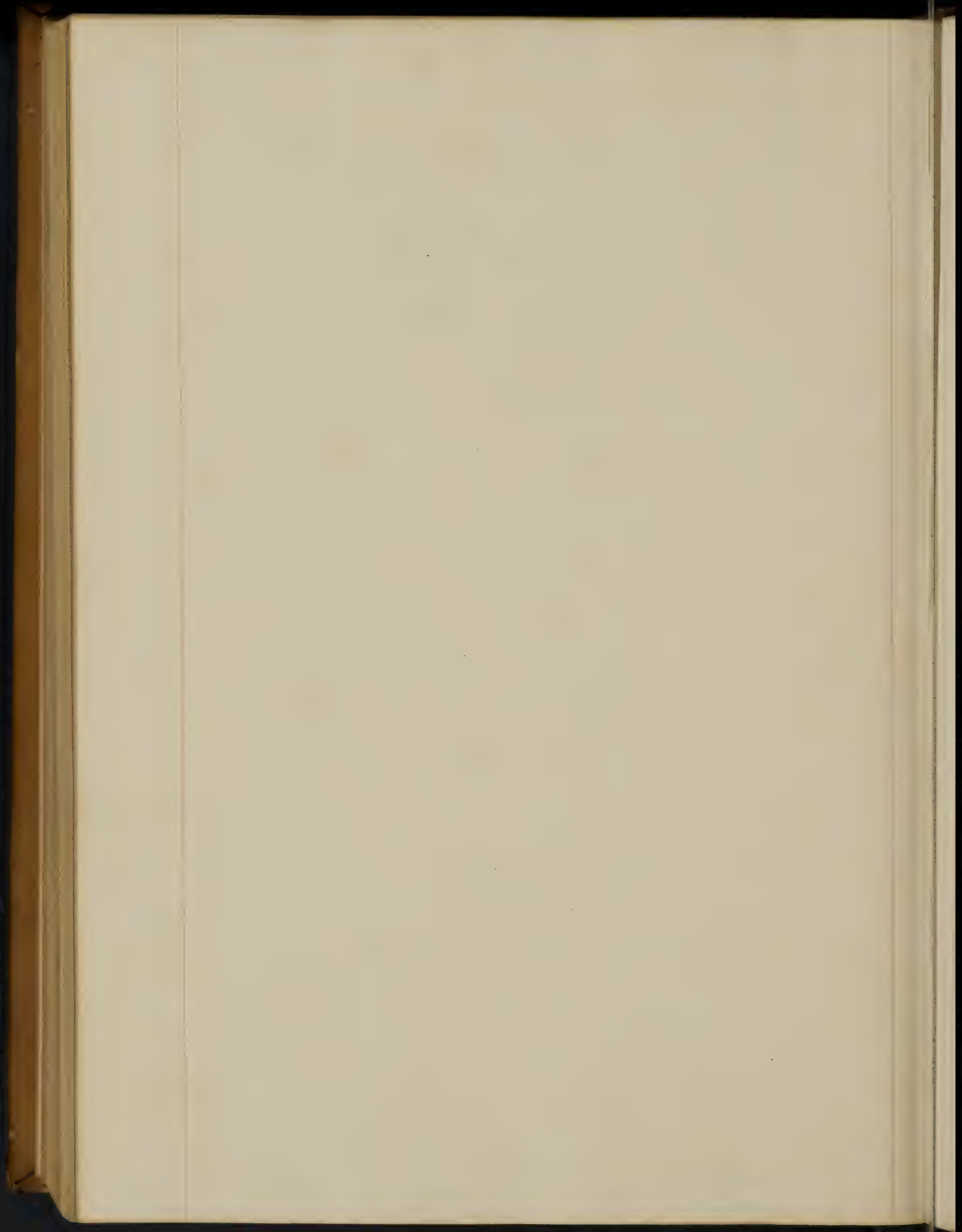


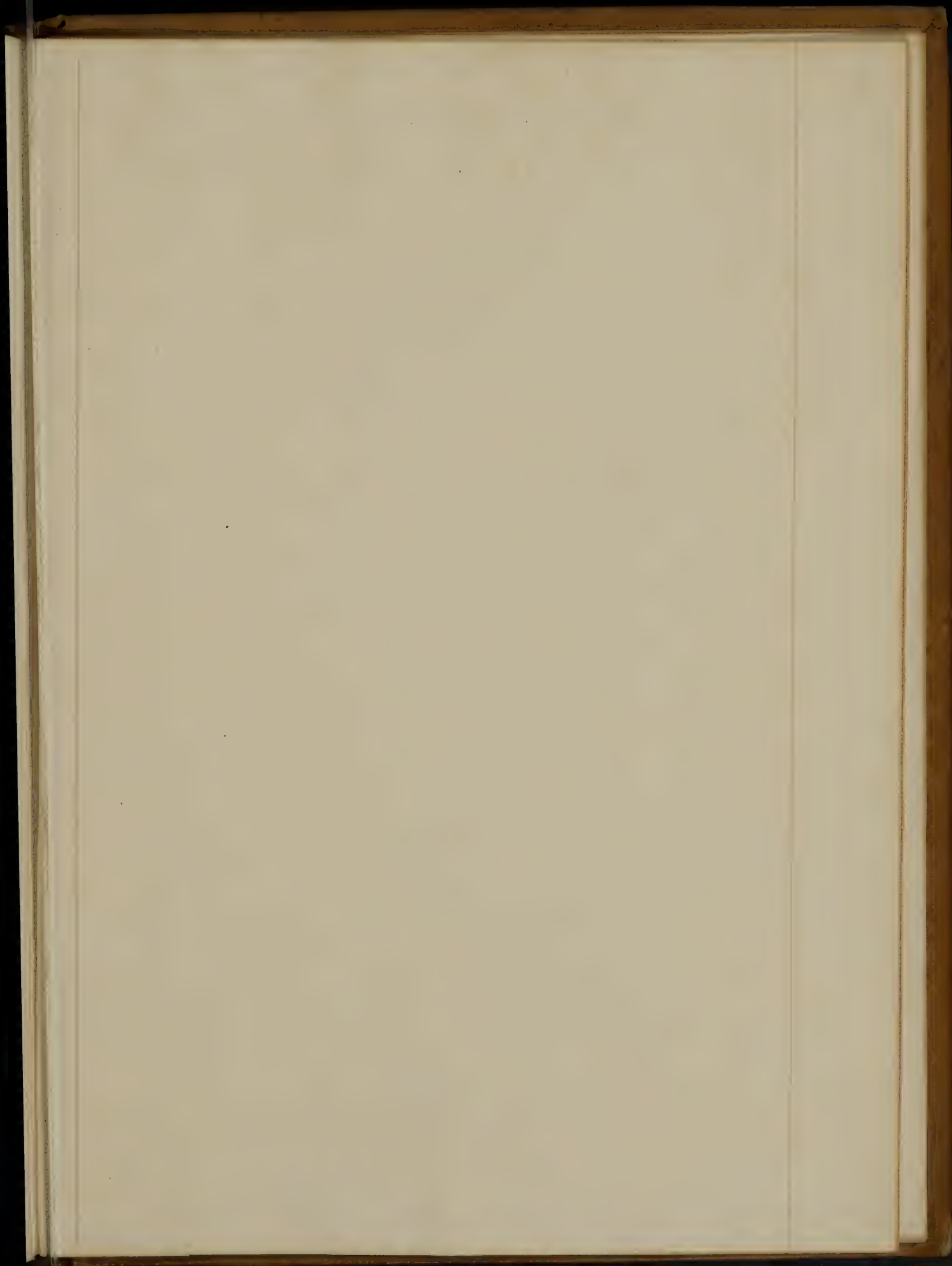


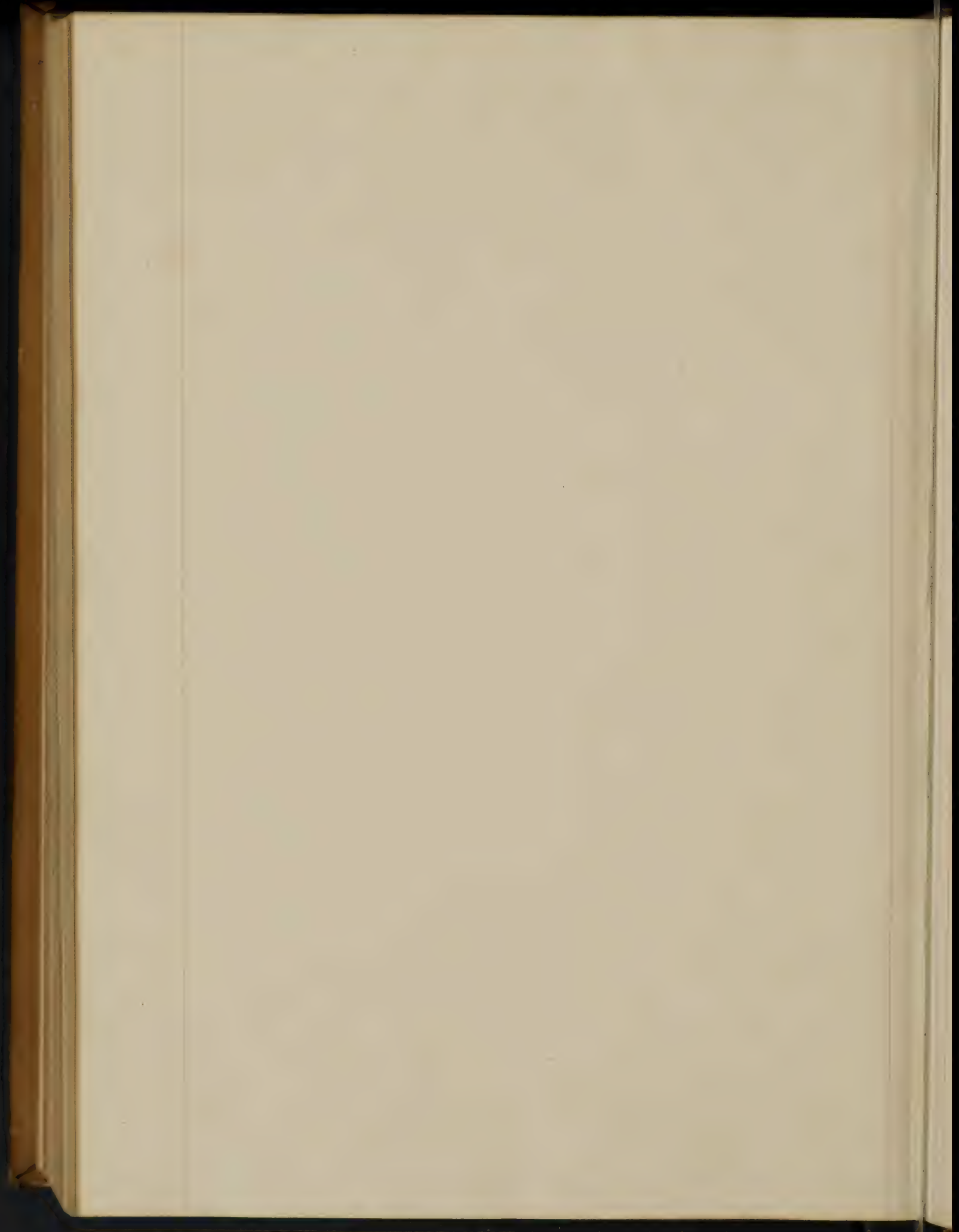


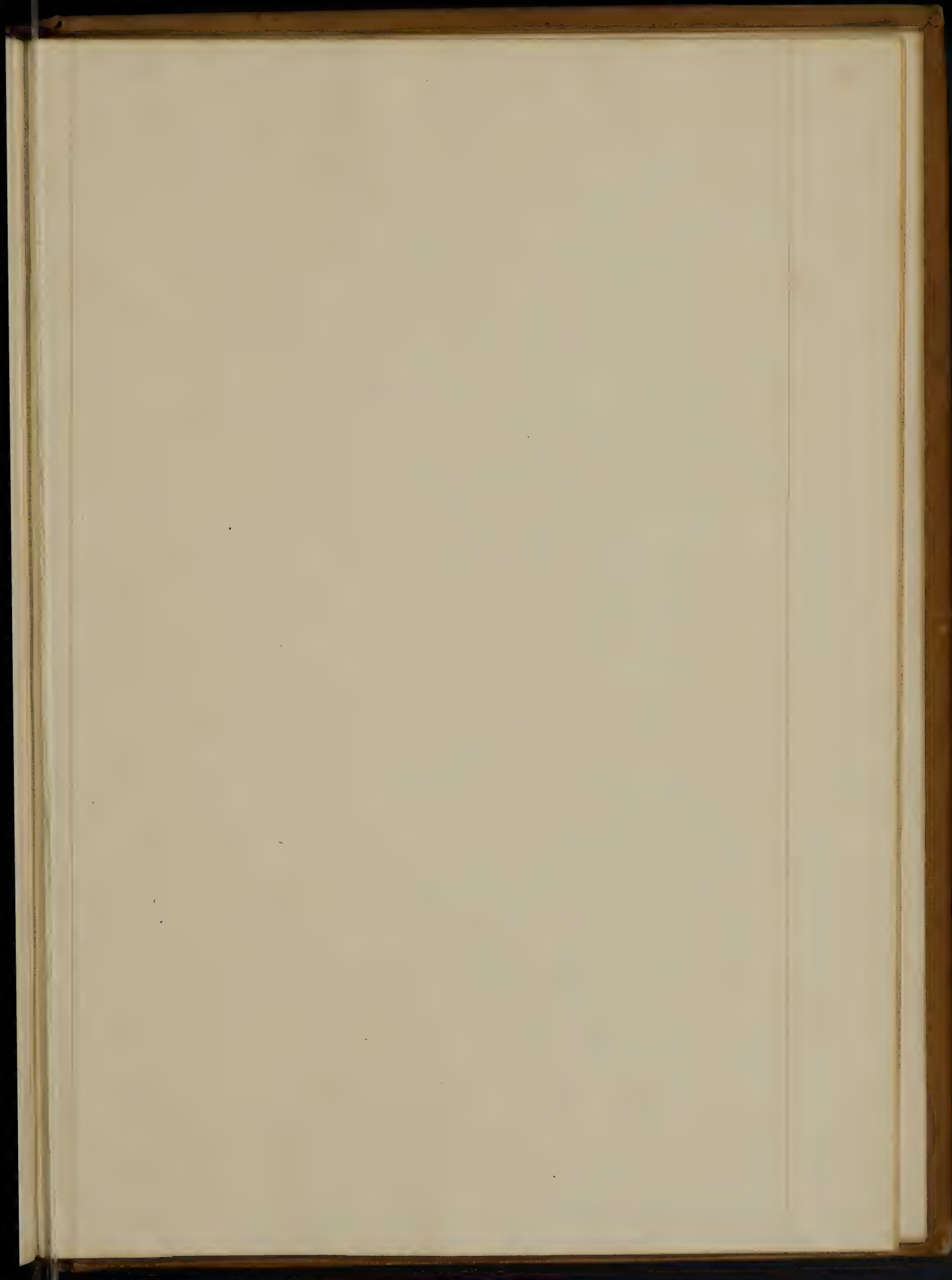


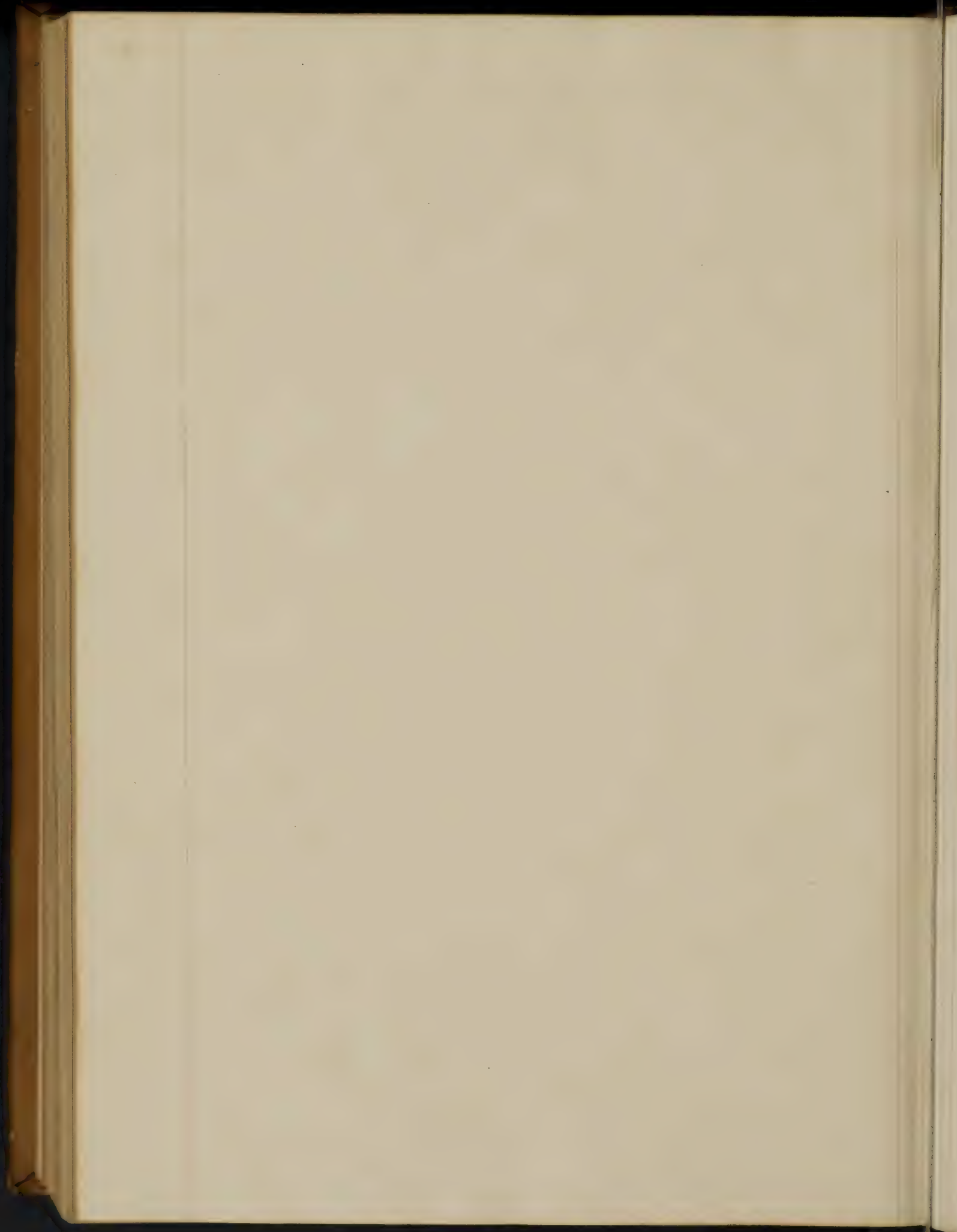


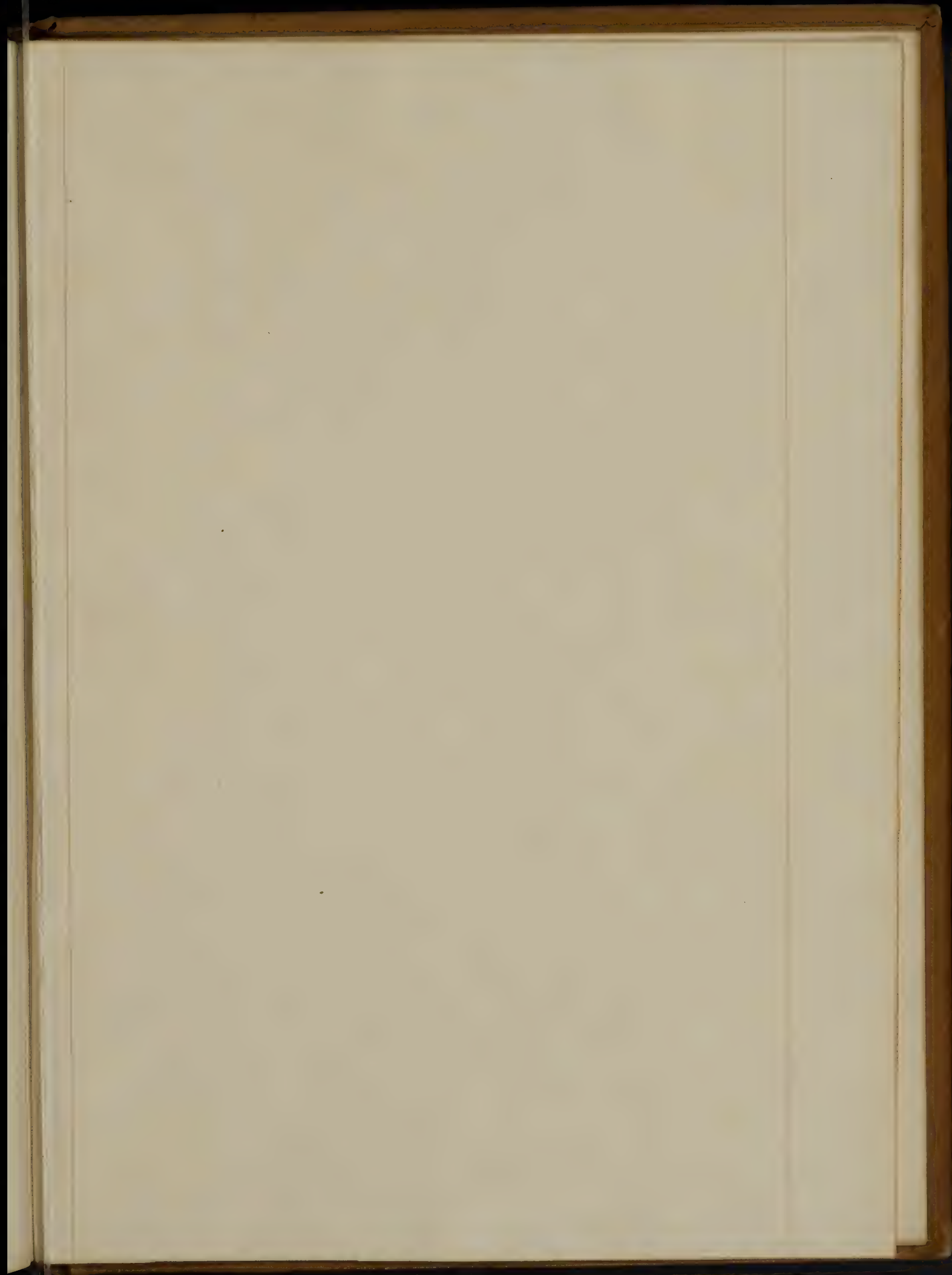


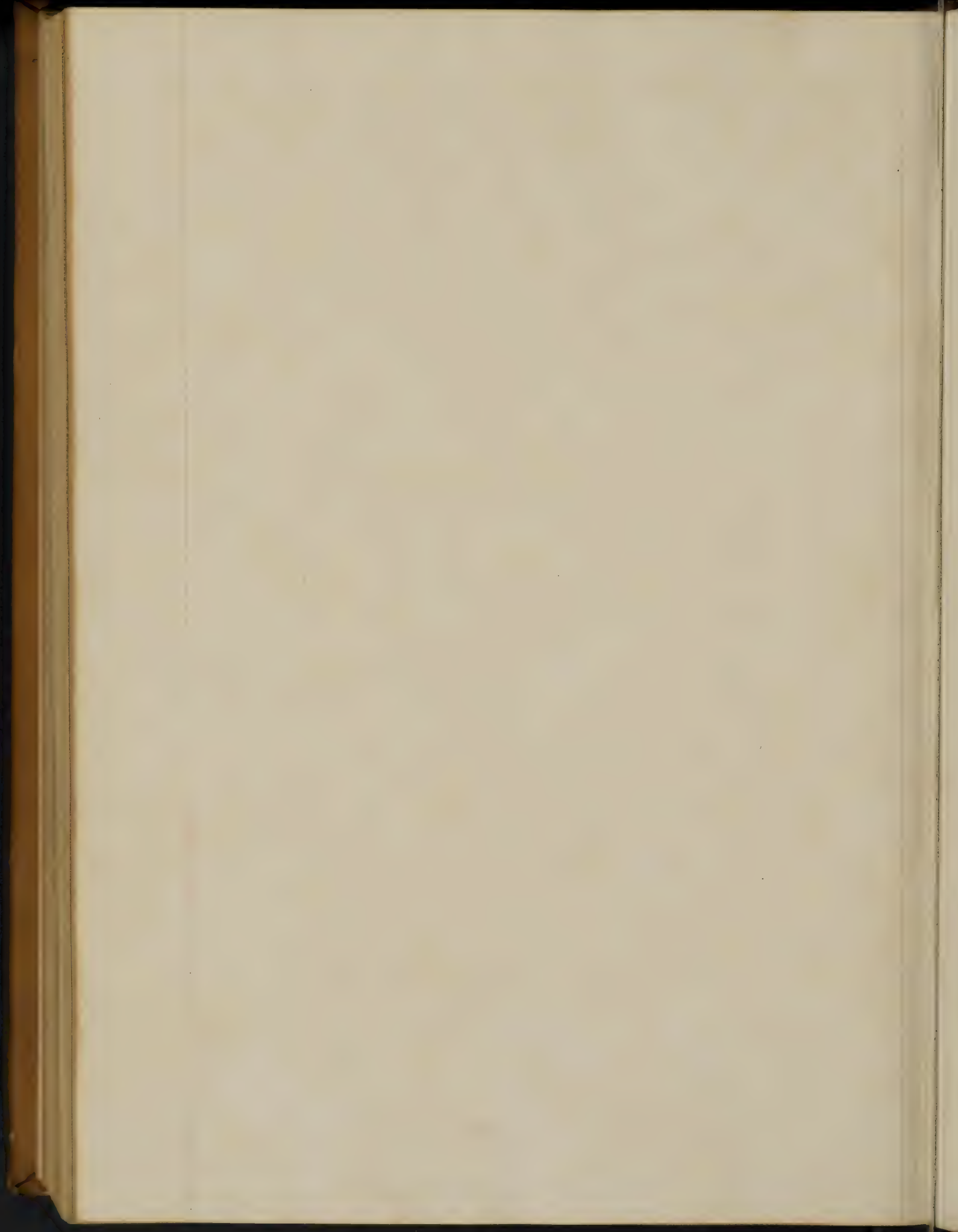




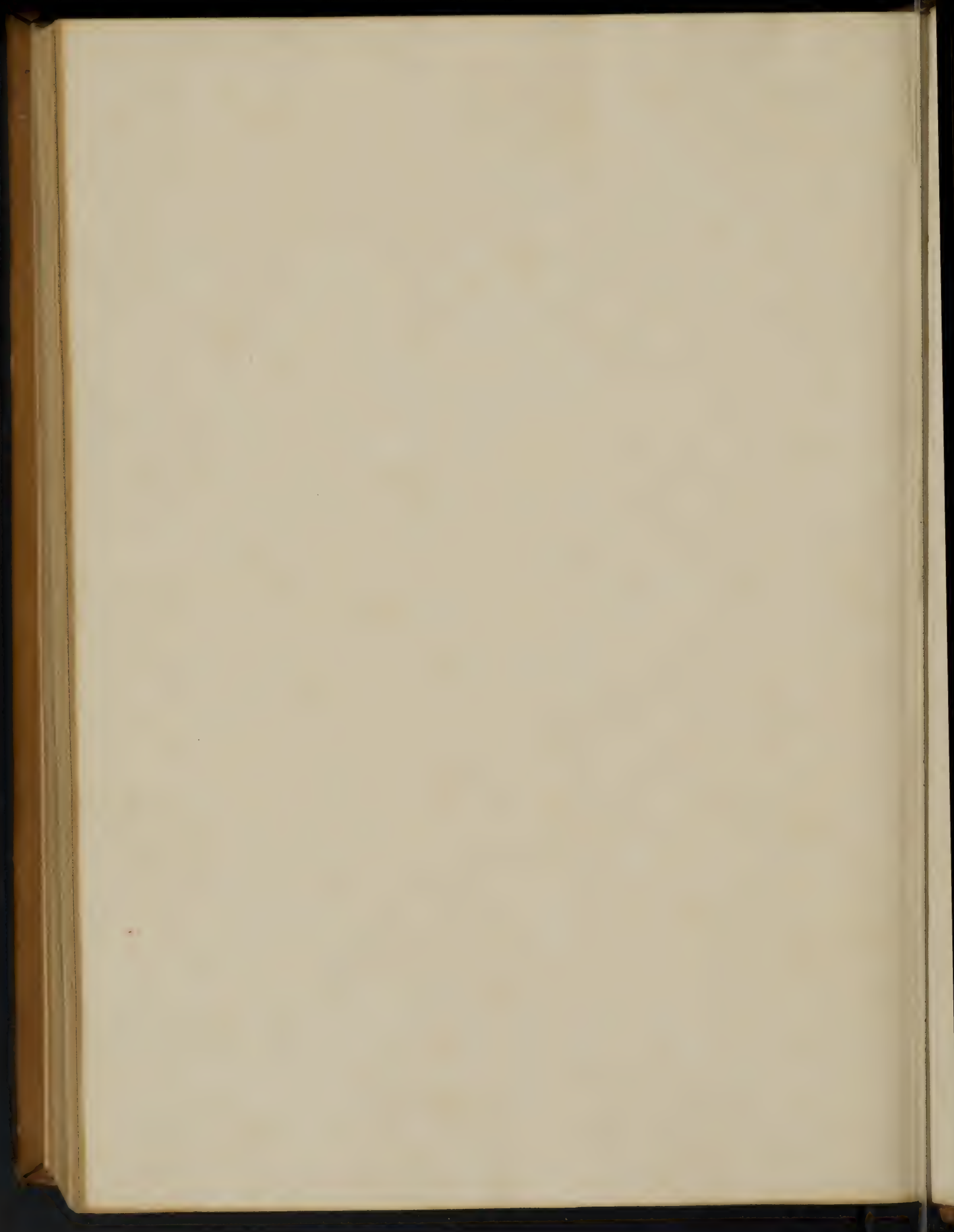


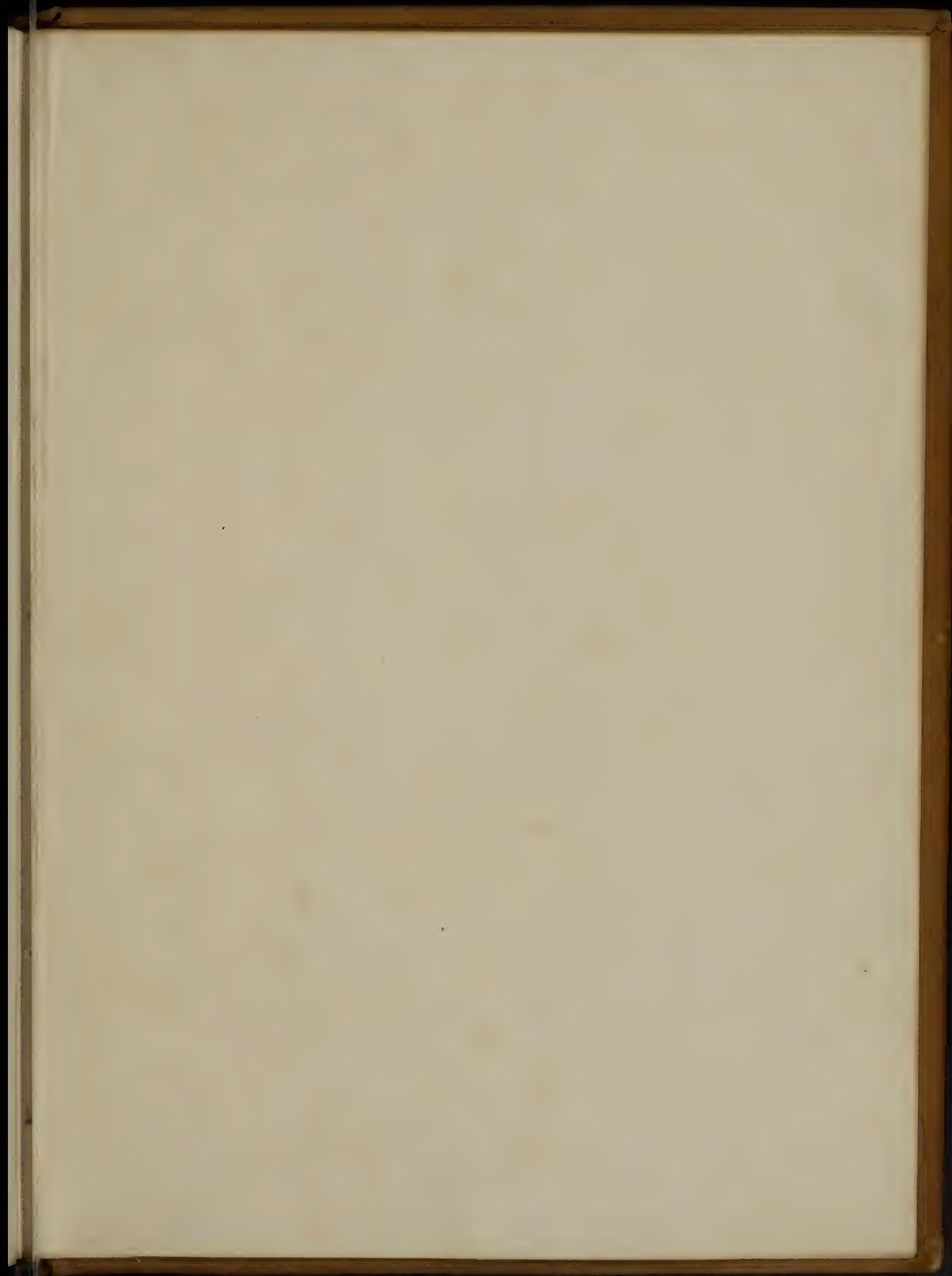


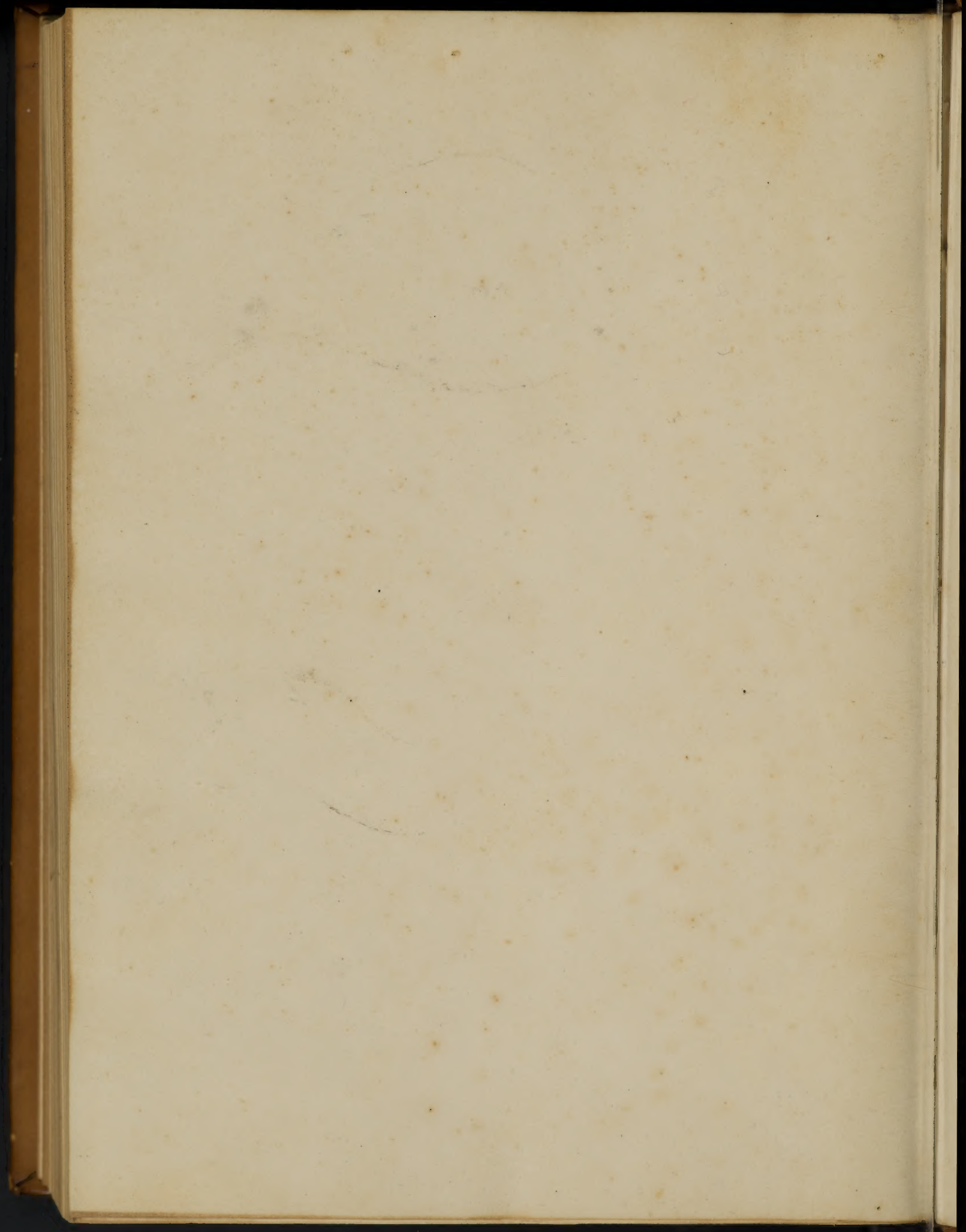




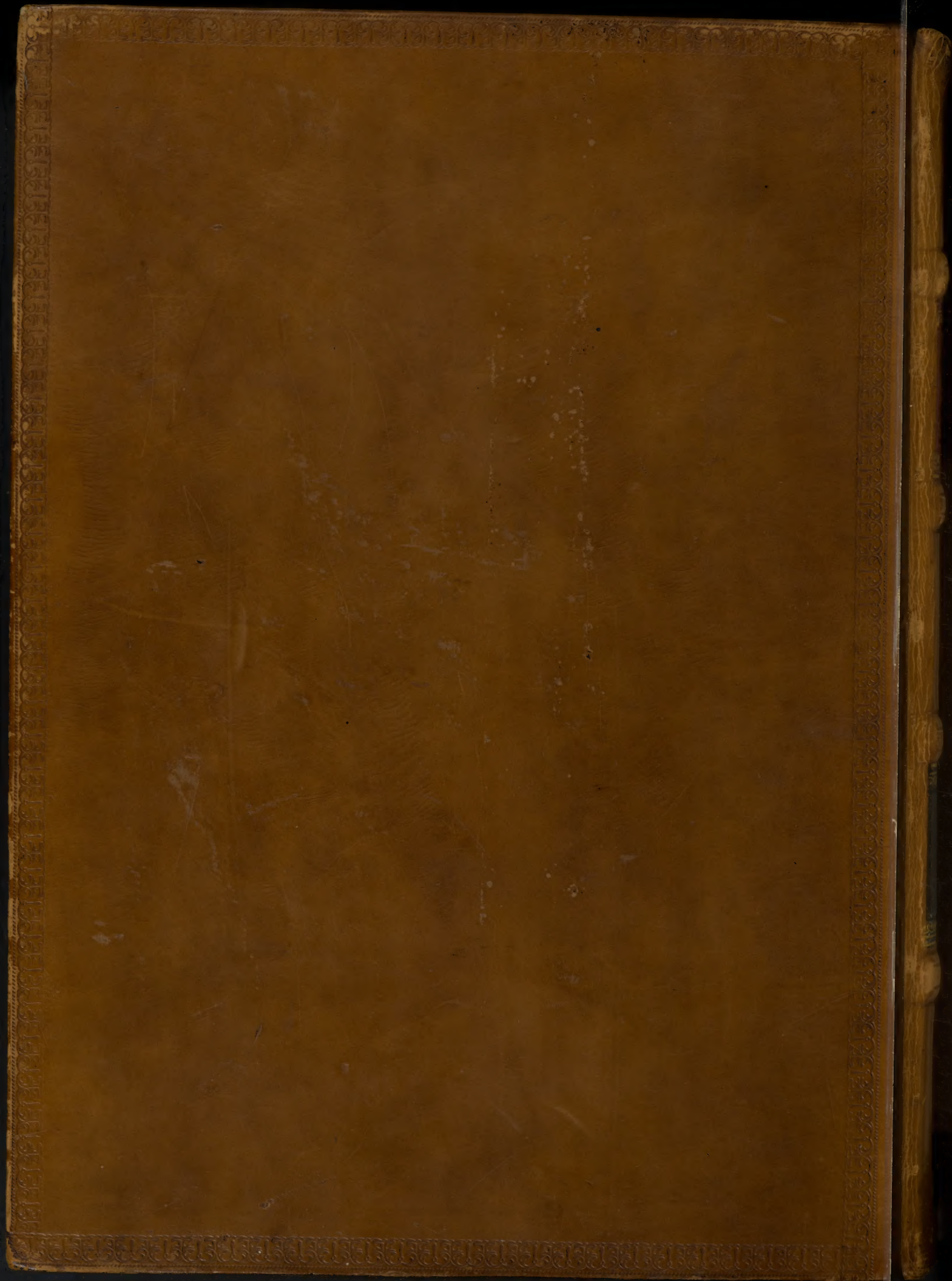
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V O L.
3.

A. POTTER